STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Marilyn Matulis,
Petitioner,
vs.
State of Illinois-Department of Revenue,
Respondent,

NO: 12 WC 09234
14IWCC0201

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, medical expenses, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 9, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

No bond or summons for State of Illinois cases.

DATED: MAR 25 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
O:2/27/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MATULIS, MARILYN
Employee/Petitioner

Case# **12WC009234**

14IWCC0201

ST OF IL-DEPT OF REVENUE
Employer/Respondent

On 7/9/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0352 LaMARCA LAW OFFICE PC
WILLIAM LaMARCA
1118 S 6TH ST
SPRINGFIELD, IL 62703

0499 DEPT OF CENTRAL MGMT SERVICES
MGR WORKMENS COMP RISK MGMT
801 S SEVENTH ST 6 MAIN
PO BOX 19208
SPRINGFIELD, IL 62794-9208

1368 ASSISTANT ATTORNEY GENERAL
CHRISTINA SMITH
500 S SECOND ST
SPRINGFIELD, IL 62706

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PKWY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JUL 9 - 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0201

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MARILYN MATULIS
Employee/Petitioner

v.

STATE OF ILLINOIS-Department of Revenue
Employer/Respondent

Case # 12 WC 09234

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **June 12, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other **Dismissal of duplicate filing-case number 12 WC 11645**

FINDINGS

On **January 17, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**40,976**; the average weekly wage was $**788**.

On the date of accident, Petitioner was **43** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

ORDER

At the request of Petitioner and with no objection by Respondent, the Arbitrator hereby dismisses with prejudice the duplicate filing of case number 12 WC 11645.

The Arbitrator concludes that Petitioner had not met her burden to prove that her left cubital tunnel syndrome arose out of or in the course of her employment and further the Arbitrator cannot conclude that the condition of ill-being is causally related to her work activities. No benefits are awarded.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

D. Dhan McCarthy
Signature of Arbitrator

July 5, 2013
Date

JUL 9 - 2013

MEMORANDUM OF DECISION OF ARBITRATOR

I. FINDINGS OF FACT

Petitioner worked for Respondent State of Illinois, Department of Revenue on January 17, 2012. Petitioner began working for Respondent in July 2000 and held several different positions. Petitioner testified that her first position was from 2000 to 2009 and was in check validation. This process entailed going through tubs of paperwork and separating the checks from the other paperwork, moving the checks to the left. Petitioner would perform this process in batches of 200 by removing the checks, using her validation stamp on the top of the paperwork and on the check and then moving the checks to her left with her left hand. Petitioner would do as many batches as she could in an hour which could be a couple hundred to a thousand an hour.

The actions performed with her left arm entailed movement of the paper to her left wherein she would pick up the papers and move them to the left by bending and straightening her left elbow. For two of the years from 2000-2009, Petitioner was a group leader and would supervisor other individuals performing the check validation process.

From 2009 to 2012, Petitioner was an Account Rep II where she would take checks that had been previously validated, take the documents out of the folder, take any staples out of the document with her right hand and separate out the checks and the documents. The movements required were that she would pick up the papers with her left hand and move them to the side by bending and straightening her left arm. Petitioner testified that she was performing these duties all day long for several days of the week. The rest of her time was spent encoding checks which would entail taking paperwork from a folder, removing the checks from the folder and putting them into the encoding machine by entering the amount of the check into the encoding machine with her right hand and then dropping the check with her left hand to run the checks through the machine and the machine would encode the bottom of the check with the amount so that it could be sent to the bank. This process required Petitioner to move her left arm by bending and straightening it. In a typical shift, Petitioner would perform this process a thousand or more times. Petitioner testified that the encoder depicted in Petitioner's Exhibit 8 was an accurate representation of the encoder that she used. Petitioner testified that the encoder machine has a divot on the left hand side where checks would sit while the amounts were entered with the right hand. Petitioner would pick up the checks individually with her left hand after the amounts were entered and place them at the top of the machine to be run through the machine. This process required Petitioner to fully extend her left arm.

On January 17, 2012, Petitioner was working on the encoding machine and noticed a pulling and burning in her left arm down to the last three fingers on her left hand. Her left hand swelled up and the last three fingers were touching. Petitioner reported this to her supervisor Mr. Perry.

Petitioner then treated with Dr. Michael Watson on January 24, 2012 who indicated his impression that Petitioner had left cubital tunnel syndrome and referred Petitioner for nerve conductions studies. Petitioner underwent an EMG on January 31, 2012 with Dr. Edward Trudeau. Dr. Trudeau's results are included in the record as Petitioner's Exhibit 2. Dr. Trudeau confirmed that Petitioner was suffering from ulnar neuropathy at the left elbow or left cubital tunnel syndrome that was moderately severe. Dr. Watson recommended Petitioner undergo cubital tunnel release surgery and Petitioner had the surgery on November 29, 2012. Petitioner remained under Dr. Watson's care until May 2013. Dr. Watson's medical records are included as Petitioner's Exhibit 1. Dr. Watson also provided an opinion letter regarding the causal connection between Petitioner's work and her job duties (Petitioner's Exhibit 3) and was deposed regarding those opinions. (Petitioner's Exhibit 5).

Petitioner also saw her primary care physician for her cubital tunnel complaints. These records are included as Petitioner's Exhibit 4.

Since the surgery, Petitioner has noticed that the tingling in her left fingertips and the pulling from the left elbow to the fingertips has gone away and the pain has gone away. Petitioner still has some pain that she reports is different than the pain prior to surgery and she refers to it as "healing" pain. Petitioner testified there are days that it does not bother her at all and some days it is sensitive and she sometimes gets pain when she tries to pick up her grandchildren. Petitioner treated in May 2013 for swelling on the left elbow because she was concerned that something was wrong however, Petitioner's doctor advised that it was part of the healing process.

Petitioner testified that her position title was an Account Clerk II and that Exhibit 9 was her performance review from September 2008 to September 2009. Petitioner testified that this document explained the expectations of her job and the number of completed documents and check verifications that she was expected to complete in a given time period and that she had the same job expectation in January 2012 as she had at the time of this performance review.

Petitioner testified that the pictures in Respondent's Exhibit 4 depict her workspace as of March 2012 and do not represent where she worked prior to the manifestation of her injury on January 17, 2012. In January 2012, Petitioner worked primarily at the encoding machine and also had a desk area that did not have a computer.

Petitioner did not experience any pain in her arm prior to January 17, 2012.

On cross examination, Petitioner stated that the majority of her time at work was not spent holding her elbow in a flexed position but moving it by extending it and flexing it for the whole time she was working. She also stated that she did not rest her elbow against any hard surface while she was working because she was always moving it in each of the different jobs that she was required to do.

Petitioner testified that she has not experienced any problems in performing her job as a result of her cubital tunnel syndrome and does not currently need to take any pain medication for her cubital tunnel syndrome.

Dr. Watson stated that it was his opinion that the tasks of holding documents with her left hand, flipping through documents with her left hand, and working at an encoding machine manually feeding checks with her left hand for up to seven hours a day "most likely either caused or contributed to the development of her left cubital tunnel syndrome and her need for surgery." (PX 3). Dr. Watson explained his causation opinion in his deposition stating that "ulnar neuropathy at the elbow begins with inflammation around the medial epicondyle. The medial epicondyle is the insertion point for a lot of the powerful wrist flexor tendons and the finger flexor tendons in the forearm and hand, and with overuse an inflammatory response is set up around the medial epicondyle and this then causes inflammation of the ulnar nerve as it passes posterior to the medial epicondyle and thus causing numbness and tingling. ***So, it's essentially the repetitive activity of gripping and using the wrist and fingers that can set up this response.***" (PX 5, p. 15).

Dr. Watson also discussed positioning of the elbow, along with putting direct pressure on it:

Q: And Doctor, you mentioned the activity of gripping as a factor in the development of the condition. What about the activity of flexion and extension of the elbow itself on a repetitive basis?

A: Well, most people believe that another contributing cause to cubital tunnel is working with the elbow in a flexed position for a long period of time. Although in reality, at least it's my opinion that most desk work and keyboarding work is all done with the elbow in a flexed position for a long period of time, and so then the other thing that can contribute it pressure directly on the elbow such as working at a desk where the ulnar nerve is up against a desk or chair or something

like this. ***So, it's probably not so much working with the elbow repetitively flexing and extending, but working for long periods of time with the elbow in a flexed position.***
(PX 5, p. 21).

Dr. Watson also stated that "sleeping with your elbows in a hyperflexed position, you more likely are going to cause symptoms at night also that can carry over into the day." (PX 5, p. 28). Dr. Watson stated that "it's not so much elbow flexion and extension as with constant elbow flexion or pressure on the ulnar nerve that can aggravate the cubital tunnel but more importantly it's the work of the wrist and finger flexors that can aggravate and inflame the area up around the medial epicondyle which sets this up." (PX 5, p. 37-38).

Dr. Watson based his opinion on his belief that Petitioner held her elbow in a fixed flexed position for a majority of her workday and used her wrist and fingers for gripping. Dr. Watson stated that, "[i]t appears to me that she's working with her elbow a good percentage of the time at 90 degree." (PX 5, p. 39). Dr. Watson stated his understanding that Petitioner's work "requires her to have her elbows in a bent position for around seven hours a day" and that "I'd say the more time that she spends with her elbows in a flexed position the more likely that that's a contributing factor in her cubital tunnel." (PX 5, p. 41).

Dr. Watson also testified that with "***power gripping and squeezing and also with repetitive finger flexing and repetitive wrist flexing*** you set up an inflammatory response at the medial epicondyle near the area of the ulnar nerve. So, unlike the elbow itself, I believe that it's the repetitive activity of the fingers and hand and the gripping activity that sets up the inflammation rather than just working with your wrists in a particular position.." (PX 5, p. 39).

Petitioner was sent for a Section 12 Independent Medical Examination by Dr. James Williams on May 30, 2012 and Dr. Williams issued a report dated the same day and an addendum report on August 19, 2012. (RX 2, Dep. Exh. 2) Dr. Williams is a board certified physician specializing in Orthopedic Surgery with an advanced certification in hand surgery. (RX2, Dep. Ex. 1).

On the date of his examination, Dr. Williams reviewed with Petitioner her health history and confirmed with Petitioner all of her job duties. Dr. Williams also reviewed the Demands of the Job form for Petitioner's job and the Position Description with Petitioner. Petitioner advised that she did not find any discrepancies. Dr. Williams also reviewed the Employee's Notice of Injury form and the Supervisor's Notice of Injury form. Dr. Williams also reviewed Petitioner's medical records and performed a physical examination.

Dr. Williams agreed with the diagnosis of left cubital tunnel syndrome and also agreed that Petitioner may require surgery. Dr. Williams summarized that Petitioner explained her job duties as "3-4 hours per day she would add documents; she said about 200 per batch. She would have to pull staples which she actually did with her right hand, not her left. She would drop checks into a machine for 3-4 hours per day which she did with her left hand; she only did that job for 3 years. She said that is when her symptoms began. I do not feel that cubital tunnel syndrome, of which she complained, would either have been aggravated and/or caused by that type of activity. ***I feel rather so as that activity is neither vibratory nor requires any reported forceful gripping as the forceful gripping of which she is doing is actually with the right hand when she is pulling staples; she is not doing that with the left hand. With the left hand, she is simply picking up checks and dropping them into an adding machine.*** She only did it for 3-4 hours per day for another 3-4 hours per day, she is not doing that activity with her left hand which should be adequate rest." (RX 2, Dep. Ex. 3, p. 4).

Dr. Williams agree with Dr. Watson that the "biggest issue is the elbow being bent, that it's been well shown that with the elbow flexed the stretch on the nerve is increased by 8mm to 1cm and thus increases the tension on the nerve and thus brings about changes in the nerve of which brings about cubital tunnel." (RX 2, p. 10).

Dr. Williams stated:

Q: Did you –by going over her job duties with her did you obtain the impression that she had consistent flexion with her job?

A: ***It did not appear as though she had consistent flexion with her job as she was changing her job activities it sounded like quite frequently.***"
(RX 2, p. 10)

Dr. Williams also stated the he did not believe that "repeated flexion or the extension of the fingers or wrists developed cubital tunnel. That's obviously a cause of carpal tunnel, but not of cubital tunnel, no." (RX 2, p.14).

In response to questions regarding whether or not the moving and flipping of documents could lead to cubital tunnel, Dr. Williams testified as follows:

Q: Did she also tell you that while removing the staples with her right hand she was gripping or holding the documents with her left hand?

A: That's correct, sir.

Q: And did she also tell you that in the process of that activity she was also flipping the documents over with her left hand?

A: Yes, I do—she did tell me that, sir.

Q: So I guess my question is Doctor, with respect to what I would call a palm up/palm down movement where you're twisting your arm repeatedly, is that the type of activity that may cause or contribute to the development of cubital tunnel syndrome?"

A: I do not believe so, sir. That involves--supination/pronation of the forearm is the activity you're describing where you're turning your hand from a palm down position to a palm up position. I don't believe that changes anything at the pressure within the cubital tunnel, sir.
(RX 2, p. 38).

In addition, Dr. Williams also advised that Petitioner had other risk factors including her posture while sleeping which she stated was holding her elbows in a flexed position and her smoking history of smoking 1 pack of cigarettes a day for 20+ years. (RX 2, Dep. Ex 2).

II. CONCLUSIONS OF LAW

Issue C: Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? *and* Issue F: Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator finds that Petitioner's job duties with Respondent did not cause or aggravate her cubital tunnel syndrome and that her current condition of ill-being was not caused by her work duties.

First of all, the Petitioner's job duties between 2000 and 2009 are not relevant to the above issues. She testified that her symptoms began In January 2012, three years after she stopped performing those job duties. Dr. Watson's opinions on causation are based upon her job duties as an account clerk, and there are no opinions dealing with any relationship between her check validation job and her condition.

Petitioner is alleging that her job duties of bending and straightening her elbow and flipping pages with her left hand were a cause of her cubital tunnel syndrome. Petitioner stated that while she was performing her job duties, she was constantly moving her left elbow to pick up documents and move them to the left side of her desk or picking up checks with her left hand to drop them into the encoding machine. Petitioner never stated

that she held her elbow in a flexed position for any extended period of time, an activity that both Petitioner's treating doctor, Dr. Watson and Respondent's IME doctor, Dr. Williams agree could contribute to cubital tunnel syndrome.

Petitioner's treating doctor, Dr. Watson, in his deposition stated that cubital tunnel syndrome ***is not caused*** by repetitively flexing and extending the elbow but rather by holding the elbow in a fixed extended position for long periods of time. Dr. Watson stated,

"***So, it's probably not so much working with the elbow repetitively flexing and extending, but working for long periods of time with the elbow in a flexed position.***" (PX 5, p. 21).

Dr. Watson based his opinion on his belief that Petitioner held her elbow in a fixed flexed position for a majority of her workday and used her wrist and fingers for gripping. Dr. Watson stated that, "[i]t appears to me that she's working with her elbow a good percentage of the time at 90 degree." (PX 5, p. 39).

Respondent's IME doctor, Dr. Williams, agreed with Dr. Watson that the "biggest issue is the elbow being bent, that it's been well shown that with the elbow flexed the stretch on the nerve is increased by 8mm to 1cm and thus increases the tension on the nerve and thus brings about changes in the nerve of which brings about cubital tunnel." (RX 2, p. 10). Dr. Williams explained this further by stating, "the increased pressure and stretching of that nerve occurs from that elbow being in a sustained bent position, which as people say occurs during sleep and that's something which can aggravate and/or bring about the symptoms of cubital tunnel, which is exactly what she describes." (RX 2, p. 31).

Petitioner never testified nor was any other evidence introduced that Petitioner held her elbow in a fixed flexed position for any extended period of time while working. Her treating doctor's causation opinion was based upon the understanding that Petitioner held her elbow in a fixed flexed position for a good percentage of her work day. However, this directly contracts Petitioner's own testimony that her elbow was never in a fixed position. Petitioner testified that her elbow was in constant motion and that she was flexing and extending it the whole shift and never holding it in a flexed position and never resting it on a hard surface.

Dr. Williams further testified:
Q: Did you –by going over her job duties with her did you obtain the impression that she had consistent flexion with her job?
A: ***It did not appear as though she had consistent flexion with her job as she was changing her job activities it sounded like quite frequently.***"
(RX 2, p. 10)

Although Petitioner did pick up the papers with her left hand, there is insufficient evidence that this action requires the type of forceful gripping or extensive flexing of the fingers that would lead to cubital tunnel syndrome. Petitioner's treating doctor, Dr. Watson, stated that "power gripping and squeezing" combined with "repetitive finger flexing and repetitive wrist flexing" could set up an inflammatory response. (PX 5, p. 39). Respondent's IME doctor, Dr. Williams, agreed that forceful gripping may relate to cubital tunnel but did not agree that "repeated flexion or the extension of the fingers or wrists developed cubital tunnel. That's obviously a cause of carpal tunnel, but not of cubital tunnel, no." (RX 2, p. 14.) Dr. Williams also stated that "repetitive forceful gripping is something that obviously entails a lot of effort in order to do it as opposed to simply you could say she's gripping paper. But to turn a paper doesn't involve a lot of force, it involves just holding onto something and turning it over, it think that's very different from as opposed to grabbing something with a significant amount of weigh and holding it." (RX 2, p. 43).

Petitioner did not testify to any forceful gripping with her left hand stating rather that she used her right hand for the repeated gripping and pinching activities of removing staples from the batches of documents. When asked further about gripping activities, Petitioner's treating doctor, Dr. Watson, could not explain why Petitioner's extensive gripping with her right hand would not have led to cubital tunnel stating, "I can't explain why it occurred on the left side rather than the right side in this particular case so I think it might be just a random phenomenon." (PX 5, p. 16).

Petitioner also indicated that her elbow hurt at night and she woke up with swelling around her elbow and the ulnar side of her hand. Petitioner's treated doctor, Dr. Watson indicated that, "if you're sleeping with your elbows in a hyperflexed position, you more likely are going to cause symptoms at night also that can carry over on into the day. (PX 5, p. 28).

Petitioner told Dr. Watson that she noticed her symptoms at work on January 17, 2012 after working a particularly busy day. She testified that she was encoding. Dr. Watson placed a lot of weight on the fact that her symptoms increased on that day. The Arbitrator does not believe that the fact that one notices symptoms while performing his or her job equates to the requisite proof of causation. Dr. Trudeau's studies done five days later show that the Petitioner had the condition for a long period of time, and that it was moderately severe. The Petitioner testified that her symptoms began that day, yet she told Dr. Watson that they had been present for several months. In all likelihood, the Petitioner noticed her symptoms by the date of her alleged accident doing any activities with her left arm.

The Arbitrator does not believe that the Petitioner's work activities of feeding checks into the encoder and separating documents by removing staples are causally related to her cubital tunnel. There was no forceful repetitive gripping, no work with the arm in a flexed position for an extended period of time and no direct pressure on the elbow.

Therefore, the Arbitrator concludes that Petitioner has not shown that her left cubital tunnel syndrome arose out of or in the course of her employment and further the Petitioner has not shown that her condition of ill-being is causally related to her work activities. Therefore all other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
MADISON

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANIEL CARSON,

Petitioner,

vs.

NO: 11 WC 15593

14IWCC0202

MENARD CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causation, medical expenses, temporary disability and permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator awarded Petitioner 10% loss of use of the right arm. We modify the Decision of the Arbitrator and award Petitioner 15% loss of use of the right arm.

Petitioner underwent cubital tunnel release surgery on his right arm and testified that the surgery was a success. Following the surgery, Petitioner participated in physical therapy. Petitioner then returned to work full duty and does not complain of continuing difficulties with respect to his right elbow. Based on the medical treatment, including the surgical intervention, we find that Petitioner suffered 15% loss of use of his right arm and increase the Arbitrator's award to reflect as such.

14IWCC0202

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $655.14 per week for a period of 68.7 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the permanent partial disability to the extent of 15% of his right arm and 15% of his right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $16,911.63 for medical expenses per the medical fee schedule under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

DATED: MAR 25 2014
TJT: kg
O: 1/27/14
51

Thomas J. Tyrrell

Daniel R. Donohoo

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CARSON, DANIEL
Employee/Petitioner

Case# **11WC015593**

MENARD CORRECTIONAL CENTER
Employer/Respondent

14IWCC0202

On 2/20/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1580 BECKER SCHROADER & CHAPMAN PC
MATT CHAPMAN
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
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0558 ASSISTANT ATTORNEY GENERAL
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0498 STATE OF ILLINOIS
ATTORNEY GENERAL
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13TH FLOOR
CHICAGO, IL 60601-3227

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

FEB 20 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0202

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Daniel Carson
Employee/Petitioner

v.

Menard Correctional Center
Employer/Respondent

Case # 11 WC 015593

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ed Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **12-18-12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **7-0210**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$56,778.00**; the average weekly wage was **$1,091.90**.

On the date of accident, Petitioner was **50** years of age, ***married*** with children under 18.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of $ under Section 8(j) of the Act.

ORDER

1. Timely notice of the accident was given to Respondent. Petitioner had no treatment for his condition prior to June 28, 2010. On July 2, 2010, Petitioner underwent a NCV/EMG. The date of the EMG/NCV is routinely upheld as an appropriate date of accident for repetitive trauma injuries. *See, e.g., Middleton v. St. Anthony's Health Center*, 11 I.W.C.C. 1138, 2011 WL 6282300 (Nov. 18, 2011). On July 16, 2010, Petitioner received the results of the testing and discussed his work activities with Dr. Davis. On July 19, 2010, Petitioner reported his injury. After receiving this notice, Respondent later approved Petitioner's treatment and paid Petitioner TTD benefits.

2. Petitioner sustained an accident that arose out of and in the course of Petitioner's job, as evidenced by Petitioner's medical history, job activities, onset of symptoms while performing his work activities, sequence of events, Petitioner's testimony, the testimony of Dr. Davis, and the reports of Dr. Sudekum.

3. Petitioner's current condition of ill-being is causally related to his work activities, based on Petitioner's testimony, Dr. Davis's testimony, Dr. Sudekum's reports, and Dr. Sudekum's testimony. Petitioner's testimony regarding his job activities, onset of symptoms, and worsening of symptoms is unrebutted. Dr. Davis testified to a reasonable degree of medical certainty that Petitioner's job activities, including rapping bars and turning keys, contributed to Petitioner's condition, which is consistent with the operative findings and Petitioner's reports of symptoms while working. Dr. Sudekum acknowledged that rapping bars and opening doors at Menard can be factors in aggravating carpal tunnel and cubital tunnel syndromes. Dr. Sudekum admitted that pinch grip and vibratory activities can cause symptoms in persons with a constricted median nerve, like Petitioner. Dr. Sudekum admitted that he would find causation if a worker presented with symptoms during or very soon after performing the repetitive activities at Menard. Dr. Sudekum admitted that causation would also be clear if the worker had a nerve conduction study while performing the job of a housing unit officer at Menard. In this case, both situations apply. Petitioner's symptoms worsened while performing the job of a housing unit officer in 2010 when the facility was on lockdown and, further, when he was assigned to that job on June 28, 2010 – the first day he sought treatment from his family

doctor. Dr. Sudekum was not provided any information regarding Petitioner's re-assignments to the housing unit while the facility was on lockdown. Petitioner was still engaged in that job when his nerve conduction study was performed. Finally, Dr. Sudekum also acknowledged that turning keys approximately 300 times per shift, even at a more modern facility, could potentially aggravate carpal tunnel syndrome.

4. Respondent shall pay the following reasonable, necessary, and related medical bills, pursuant to the medical bill fee schedule:

Southern Illinois Orthopedic Surgery Center	$8,632.00
Brigham Anesthesia	$ 855.00
Southern Orthopedic Associates	$6,525.00
Healthlink	$ 864.63
Out-of-Pocket	$ 35.00

5. Respondent has paid all TTD benefits and did not dispute that Petitioner was owed these benefits.

6. Respondent shall pay the Petitioner the sum of $655.14/week for a period of 56.05 weeks as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to the extent of 15% of his right hand, and 10% of the right arm.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

2/16/13
Date

FEB 20 2013

Daniel Carson vs. Menard Correctional Center
11 WC 015593

14IWCC0202

The Arbitrator hereby finds the following:

On July 2, 2010, Petitioner was employed as a correctional officer at Menard Correctional Center. Petitioner started working at Menard in 1991. Petitioner worked various assignments during his career, but was primarily assigned to housing units, also known as galleries. Using the timeline set forth in Respondent's Exhibit 6, Petitioner testified as to his various assignments with Menard.

From 1991 until January 1999, Petitioner worked in various housing units. There are 55 cells per housing unit. Petitioner worked eight hour shifts, with one half hour for a lunch break. Petitioner testified that when he worked in housing units he performed various repetitive hand activities. For example, Petitioner was required to rap the cell bars at the beginning of the shift. Each cell has seven rows of steel bars. Rapping bars is a procedure whereby a correctional officer uses a hand held metal baton, approximately one foot long, to check the integrity of the steel bars on each cell, by dragging the baton across the intact cell bars. Petitioner would perform this task at the beginning of his shift, striking and dragging his baton across each cell bar. When doing so, the metal baton would vibrate in Petitioner's hand. Petitioner, who is right hand dominant, would use his right hand to rap bars.

As a housing unit officer, Petitioner also would repetitively turn Folger Adams keys to allow for inmate movement. A Folger Adams key is larger than a standard door or car key. It is approximately four or five inches long. There are two keyholes per cell. Petitioner would insert the key into a keyhole and turn the key manually, using his right hand. The key is turned clockwise or counter clockwise. Petitioner explained that the Menard was constructed back in the 1800's. Accordingly, the keys and locks are very old. Petitioner would frequently have to use forceful manual twisting to get the locks to open. There are two keys per cell that have to be unlocked to open the cell door. Petitioner would unlock the cells on the entire housing unit in the morning. Petitioner would also have to unlock cells when running inmate movement to the yard, chow hall and commissary. Petitioner would also have to then lock the two locks per cell at the end of his shift. Petitioner explained that Menard does not have a control room with a push button to open the cell doors in a housing unit - everything is manually locked and unlocked. Petitioner testified he would turn Folger Adams keys approximately 300 to 500 times per shift.

When opening the cell doors, Petitioner would have to grip with his right hand and pull the cell doors from right to left. So, in addition to turning the keys, Petitioner would be exerting pinch grip manual force to grasp the door handle and pull the doors open. Some of the doors would be difficult to open.

As a housing unit officer, Petitioner would also have to pack trays. This is a task where a correctional officer takes 54 trays of food, weighing in excess of 100 pounds, and carries them, with his arm in a non-neutral position, up flights of stairs to the housing unit. This task is performed while the facility is on deadlock and the inmates are eating in their cells. Petitioner would also have to "pack ammo." Packing ammo involves putting ammo in a 40 lb. bag and carrying it with his arm at a 90 degree angle and his forearm upright with his hand bent backwards, carrying the bag over his shoulder. Petitioner would have to carry this bag approximately ¾ miles to the tower officer.

Menard, which is a maximum security facility, is frequently on deadlock. When on deadlock, there is little to no inmate movement. While on deadlock, a housing unit correctional officer would still have to rap bars, pack ammo and pack trays.

Correctional officers also have to carry various items throughout their shift. For example, Petitioner would have to carry laundry bags and property boxes. The laundry bags were huge. Petitioner would carry the bag in his right hand with the bag over his shoulder. While doing so, his wrist would be bent backward by the weight of the bag. Property boxes weighed over 100 pounds. Petitioner would sometimes have a correctional officer assist him carrying the rectangular box. But, most of the time, Petitioner would carry the box with his arms in a non-neutral position on either end of the property box.

Petitioner testified that in 1996 to 1997 he worked at the hospital front desk. In this position, Petitioner's repetitive hand activity would include opening and closing the doors to the hospital to allow for inmate and staff movement. The door used a Folger Adams key. Petitioner testified there are 200 passes a day. Accordingly, Petitioner would be locking and unlocking the door 400 times just for the inmate passes. In total, Petitioner estimated that he would turn keys in that position approximately 400 times per day.

In 1998, Petitioner worked as a construction officer. Petitioner testified that, as a construction officer, he would maintain security for the construction contractor performing work at the facility. Petitioner testified that there is minimal keying in this job. However, when construction was not going on or when the facility was on lockdown, he would be assigned to a housing unit. Petitioner is 6 feet 4 inches and 250 pounds. Whenever the facility was on lockdown, Petitioner would be primarily reassigned to a housing unit. Accordingly, even though he was staffed as a construction officer from 1998 to 2004, half of the time he was be staffed in a housing unit.

From 2004 through approximately 2007, Petitioner worked as a chapel officer. While a chapel officer, Petitioner still packed weapons and ammo. He also performed keying with regular house key size keys approximately 100 times per day. He did not rap bars in this job. However, as with construction officer, whenever the facility was on lockdown, inmates were not permitted to go to the chapel. Accordingly, Petitioner would be reassigned to a housing unit, where he would rap bars, turn Folger Adams keys, open and close doors, pack ammo and pack trays.

Petitioner was next assigned to a catwalk position where he would provide security from a raised position in the facility and monitor the inmates from above. In 2009, Petitioner was assigned to the east house housing unit, where he performed the housing unit tasks as described earlier.

Petitioner testified that Respondent's Exhibit #7, provides an accurate timeline of his job assignments from February 28, 2009 through the present. Petitioner was assigned to the chapel from February 28, 2009 through February 21, 2010. Petitioner was assigned to the healthcare unit from February 22, 2010 through June 28, 2010. In the healthcare unit, Petitioner would have to perform keying approximately 200 times per shift.

During this time period, February 2010 through June 2010, the facility was on lockdown 50% of the time. Accordingly, Petitioner was working as housing unit officer, performing housing unit repetitive tasks, for half of his time during this period. Petitioner also worked overtime and weekend hours in the housing unit during this period.

On June 28, 2010, Petitioner was assigned to the North 1, 3 Gallery, or housing unit, as his primary job. (RX7). He worked in the North house, performing the repetitive housing unit tasks as noted above, through mid-July, 2010, when he was reassigned to the medium security unit at Menard.

Petitioner testified that, during the course and scope of his employment, he developed symptoms in his right hand and right arm. Petitioner explained that he primarily had symptoms in his little and ring finger, but also had numbness and tingling in his middle finger, ring finger and thumb. Petitioner also had pain and numbness in his elbow. Petitioner explained that he first noticed his symptoms some time ago, but could not specifically recall when. Petitioner explained that this was gradual issue that continued to worsen until the early

summer of 2010. Prior to the summer of 2010, Petitioner's symptoms would come and go and were not causing him difficulty on the job. Petitioner explained that he first noticed his symptoms at work while performing the tasks of a housing unit officer. Petitioner explained that in the summer of 2010, when his symptoms worsened, he was performing housing unit tasks, including rapping bars, turning Folger Adams keys, and opening and closing doors. Petitioner explained that these activities would cause him symptoms while performing the tasks. Typically, the symptoms worsened about an hour or two into his shift. Petitioner's symptoms no longer came and went, but remained and worsened.

On June 28, 2010, (the first day he was assigned primarily to the North housing unit), Petitioner saw Dr. Kupferer, his family doctor. (PX1) This is the first medical record in the file reflecting any medical treatment for Petitioner's hand and arm symptoms. In that visit, Petitioner complained of numbness in his 4th and 5th fingers on his right hand. Consistent with his testimony at trial, Petitioner reported that his symptoms had increased over the last month. (PX1, at 2) Dr. Kupferer referred Petitioner for an EMG/Nerve Conduction Study, which was performed on July 2, 2010. (PX3) The EMG/NCV revealed moderate to severe right ulnar neuropathy at elbow (cubital tunnel syndrome) and mild right carpal tunnel syndrome. (PX3, at 2) Based on the results of the study, Dr. Kupferer referred Petitioner to Dr. J. Michael Davis. (PX1, at 1).

On July 16, 2010, Dr. Davis diagnosed Petitioner with ulnar neuritis, or cubital tunnel, and recommended surgery. (PX2, at 3) In an intake sheet, Petitioner listed hypertension as a medical condition. (PX2, at 6) Petitioner testified he was taking medication, which controlled his hypertension. Petitioner also testified he suffered from gout-related issues with his foot. Petitioner testified he never experienced any unusual swelling at his wrist or elbow. Petitioner explained that Dr. Davis asked him what his job duties were because repetitive activities could cause Petitioner's symptoms. Petitioner had a discussion with Dr. Davis regarding his job duties. It was during this discussion that Petitioner first connected his symptoms to his work activities.

On July 19, 2010, Petitioner filed an Employee's Notice of Injury with Respondent. (RX2) At the time he filled out this notice, Petitioner was working at the medium security facility. Petitioner explained he put "MSU" in the blank for where the injury occurred because that was where he working at the time he filled out the report. Respondent also prepared a Supervisor's Report of Injury or Illness, which was admitted as Respondent's Exhibit 3. In that report, it is noted that Petitioner was suffering from numbness to his right hand and elbow pain.

On September 2, 2010, Petitioner reported to Dr. Davis that he was continuing to have persistent difficulties, with numbness in his ring and little finger and also in the other digits. Petitioner's physical examination revealed a positive Tinels sign at the cubital tunnel and a mildly positive Tinels at the carpal tunnel. (PX2 at 9) Dr. Davis also noted diminished grip strength. Dr. Davis diagnosed Petitioner with right carpal and cubital tunnel syndrome. At this point, Dr. Davis again recommended surgery and attempted to get workers' compensation approval for an open carpal tunnel release and subcutaneous right ulnar nerve transposition. (PX2 at 9)

Respondent approved the procedures, which took place on October 12, 2010. During the surgery, Dr. Davis noted there was erythema and hour glass constriction of the median nerve. (PX5, at 2) Dr. Davis also noticed there was significant fibrosis and adhesions of the ulnar nerve especially in the cubital tunnel with erythema and evidence of constriction of the ulnar nerve in this area. (Id.) After surgery, Dr. Davis held Petitioner off of work. During this period, Respondent paid Petitioner temporary total disability benefits. Petitioner underwent physical therapy at Southern Orthopedic Associates. (PX6)

Petitioner had an uneventful recovery and was returned to work without restrictions on December 6, 2010. (PX2, at 25) On January 10, 2011, Petitioner reported transient numbness in the little finger. However, his strength and overall range of motion and his sensation was much improved. Petitioner reported he was working

full duty without difficulty. The medical note indicates that, although Petitioner was not yet at maximum medical improvement, he will likely see the residual symptoms continue to resolve over the next several months. (PX2, at 30).

Petitioner testified that the surgeries were a success. Petitioner noted what he perceives to be a lack of grip strength in his hand and arm, but did not know whether that was related to his repetitive trauma injuries or just the natural aging process. Petitioner explained he never had symptoms in his left hand or left arm.

Received into evidence as Petitioner's Exhibit 7 is a report from Dr. Anthony Sudekum dated March 30, 2011. In that report, Dr. Sudekum rendered opinions regarding the work relatedness of a Menard correctional officer's upper extremity complaints. Although the identity of the correctional officer has been redacted, the worker performed the duties of a housing unit officer, just as Petitioner did. Dr. Sudekum reviewed a DVD depicting correctional officers performing various job tasks and duties at Menard. Dr. Sudekum also reviewed a Job Analysis. In the DVD, Dr. Sudekum noted an officer is depicted attempting to turn a lock with a Folger Adams key, which would not initially turn until the officer had removed and reinserted different keys and applied forceful manual twisting to unlock the door. (PX7, at 2) Dr. Sudekum also viewed a depiction of correctional officers rapping bars. Dr. Sudekum's description of rapping bars is consistent with Petitioner's testimony at trial. (PX7, at 3) Dr. Sudekum also visited and toured the facility, spending approximately 4.5 hours at the facility, including the housing units. Dr. Sudekum also performed the bar rapping procedure himself. After reviewing the worker's medical history and discussing the work activities at Menard, Dr. Sudekum opined "that the work activities at Menard Correctional Center served to aggravate bilateral carpal tunnel syndrome and left ulnar neuropathy." (PX7, at 9)

Petitioner also submitted into evidence as Petitioner's Exhibit 8, a report from Dr. Sudekum dated April 29, 2011. In this report, Dr. Sudekum, at the request of Respondent, reviewed the position of correctional officer at Menard Correctional Center to render an opinion regarding the possible causative effect of these job duties on the development of repetitive trauma injuries. (PX8, at 1) Like with his prior report, Dr. Sudekum reviewed a Job Site Analysis, a position description, a statement indicating repetitive movements for a correctional officer, a DVD/video and personally toured the Menard Correctional Center. During his tour, Dr. Sudekum spoke to many correctional officers and performed many of the manual tasks performed by the correctional officers at Menard. (PX8, at 1) In that report, Dr. Sudekum concludes:

> "Based on my evaluation of the information which I have received including written job descriptions, the DVD/video of the job site, and my first hand evaluation of the facility and job activities, it is my opinion that the job activities of a correctional officer at Menard Correctional Center would not serve as a primary etiologic factor in the development of upper extremity "repetitive trauma injuries" however, I feel that these work activities could be a possible aggravating factor in the development and/or progression of these conditions." (PX8, at 14)

Dr. Michael Davis testified on behalf of Petitioner. (PX9) Dr. Davis is a Board Certified Orthopedic Surgeon, who performs upper extremity surgeries. (PX9, at 6) Dr. Davis testified that, based on the diagnostic testing, his preliminary diagnosis of Petitioner was cubital tunnel syndrome of the right elbow, as well as electrodiagnostically noted carpal tunnel syndrome. (PX9, at 8) Dr. Davis noted that on September 2, 2010, Petitioner had positive Tinels at the elbow and the carpal tunnel. Dr. Davis explained that a positive Tinels indicates hypersensitivity or irritation of the nerve. (PX9, at 9) When discussing surgery with Petitioner, Dr. Davis noted that although the majority of his symptoms were related to the ulnar nerve at the elbow, Petitioner did have carpal tunnel symptoms as well. (Id.) Dr. Davis explained that his office sought workers' compensation approval for surgery. (PX9 at 9,10) Dr. Davis testified that the finding of an hour glass constriction of the median nerve is indicative of prolonged compression of the median nerve within the carpal

tunnel region. (PX9, at 10) Dr. Davis explained that erythema is a redness or inflammation at the nerve. (Id.) Dr. Davis explained that the ulnar nerve at the elbow had findings consistent with compression or irritation of that nerve as well as fibrosis or scar tissue. (PX9, at 10) Dr. Davis explained that the intraoperative anatomical findings could be attributed to overuse. (PX9, at 11)

Consistent with Dr. Sudekum's reports, Dr. Davis opined to a reasonable degree of medical certainty, that Petitioner's work activities, including bar rapping and turning keys, contributed to Petitioner's carpal tunnel syndrome and cubital tunnel syndrome. (PX9, at 13) Dr. Davis explained that vibratory activities, such as rapping cell bars, could cause or aggravate these conditions. (PX9, at 14) Dr. Davis further testified a person with an hour glass constriction of the median nerve and significant fibrosis and constriction of the ulnar nerve could aggravate those conditions by performing vibratory activities such as bar rapping. (Id.) Those were also the type of conditions that could be aggravated by the use of pinch grip force, such as turning a key in a repetitive manner. (PX9, at 14) Dr. Davis testified that all of his treatment of Petitioner was reasonable and necessary to treat his condition. (PX9, at 14-15) Dr. Davis also explained that a worker who is exposed to vibratory activities for a long period of time, without getting symptoms, would be more susceptible to developing repetitive trauma injuries with much less frequency and duration as someone who did not have a long history of performing vibratory activities. (PX9, at 31).

Dr. Sudekum testified on behalf of Respondent. Dr. Sudekum did not examine Petitioner nor discuss his job assignments and activities with him. (RX13, 50). Dr. Sudekum also did not review Dr. Kupferer's medical chart. (RX13, 54) Dr. Sudekum's understanding was that Petitioner had worked at the Menard maximum security unit up until January, 2010. (RX13, at 27). Dr. Sudekum also assumed that Petitioner worked as a school officer at the medium security unit beginning in January 2010. (RX13, at 27) Dr. Sudekum testified that Petitioner had various risk factors for the development of carpal or cubital tunnel syndrome, including his age, arthritis in his right hand and shoulder, hypertension, obesity, gout and hobbies, including hunting, which depending on the level of activity, could also pose a risk. (RX13, 33-34). Dr. Sudekum felt that Dr. Davis could have considered conservative treatment prior to surgery, but admitted that Petitioner had a successful post-surgical outcome. Dr. Sudekum opined that he did not feel that Petitioner's employment activities at either the maximum security facility or the medium security facility caused or aggravated his carpal and cubital tunnel syndrome. (RX13, at 40)

Dr. Sudekum acknowledged that he had previously given an opinion that the job duties at Menard maximum security unit could cause or aggravate carpal or cubital tunnel syndrome, but, in this case, Dr. Sudekum testified that he had no indication in the records that Petitioner developed any symptoms during the time he was performing the job duties at the maximum security facility. (RX13, 42-43). Dr. Sudekum explained that the job activities that could potentially contribute to repetitive trauma conditions would be the bar rapping procedure and the opening and closing of heavy doors. (RX13, 43-44). Dr. Sudekum also assumed that Petitioner only worked at the housing unit in 2010 beginning on June 28th through July 10, 2010. (RX13, 44-45).

On cross-examination, Dr. Sudekum admitted the Respondent never consulted him when Respondent was first notified of Dr. Davis' treatment plan. (RX13, at 50,51) Dr. Sudekum agreed with Dr. Davis' diagnosis of cubital tunnel syndrome. (RX13, at 52) Dr. Sudekum also acknowledged that the EMG/NCV revealed mild right carpal tunnel syndrome. (RX13, 54) Dr. Sudekum also admitted that a clinical test for carpal tunnel syndrome would include a positive Tinels sign. (RX13, 54) Dr. Sudekum also admitted that erythema at the median nerve is associated with irritation of the nerve, which could be the result of an injury or nerve irritation. (RX13, at 55). Dr. Sudekum admitted that an hour glass deformity at the median nerve means that the nerve is literally pinched at that point and is swollen. (RX13, 55-56) Dr. Sudekum explained that this is a finding associated with relatively advanced carpal tunnel syndrome. (RX13, at 56) Dr. Sudekum admitted that someone with a constricted median nerve would experience symptoms with hand activity. (Id.) More

specifically, Dr. Sudekum admitted that a person with this condition would have symptoms with activities including pinching, gripping and grasping. (RX13, at 57) Dr. Sudekum admitted that vibratory activities could cause symptoms in a person with that finding. (RX13, at 58)

Dr. Sudekum admitted that, in his April 20, 2011 report, he did not qualify his opinion with respect to a duration or frequency of work activity that would be sufficient to cause or contribute to repetitive trauma injuries. (RX13, at 66, 67) Dr. Sudekum admitted that he knew, when he was preparing that report, that Respondent was going to use his opinion in evaluating pending repetitive trauma claims out of Menard. (RX13, 67) Dr. Sudekum agreed that the opinion he reached in his April 20, 2011 report was based on a review of a job description, individual job activities, a Job Analysis, as well as his personal observation. (RX13, at 67)

Dr. Sudekum further explained that with respect to the development of repetitive trauma conditions, he would need to see an onset of symptoms present during or very soon after the performance of the activities that he deemed potentially provocative. (RX13, at 68) Dr. Sudekum further opined that, "if you assume that the patient had symptoms during the time and had a nerve conduction performed during the time he was performing those activities ideally seen by a physician who made the diagnosis during the time, yes, then I would say that those could have been served as a potential aggravating factor as I opined in my note." (RX13, at 69,70) Dr. Sudekum admitted that he was not provided any information regarding Petitioner's job activities during a lockdown. Dr. Sudekum also admitted that he had previously testified that opening and closing 300 locks per shift at a more modern correctional facility in Centralia, Illinois would potentially aggravate carpal tunnel syndrome. (RX13, at 78,79) With respect to comorbid factors, Dr. Sudekum stated that he has not received sufficient information regarding Petitioner's hobbies or recreational activities, for example hunting or riding horses, for him to reach an opinion to reasonable degree of medical certainty that those indeed played any role in his symptomology. (RX14, at 88) As to gout and hypertension, Dr. Sudekum admitted that whether hypertension was controlled or whether the gout was limited to the foot, as opposed to the hand or wrist, would be a significant distinction. (RX14, 88-89).

Alex Jones also testified on behalf of Respondent. Mr. Jones is currently the Menard Medium Security Unit superintendent. He first arrived at the Menard medium security unit in November of 2012. Mr. Jones never worked with Petitioner. Mr. Jones testified that when he was assigned to different facilities within the State of Illinois, he would review documents and reports regarding the frequency that Menard maximum security facility was on lockdown. Mr. Jones testified that over a 20 year history, Menard would be on lockdown on average of 25 to 30% of the time. However, Mr. Jones could not refute Petitioner's testimony regarding Menard being on lockdown 50% of the time from January 2010 through July 2010. Mr. Jones, who – unlike Petitioner – could not testify from first hand knowledge, admitted that Respondent has at its disposal evidence relating to the exact frequency of lockdown at Menard maximum security, but did not provide any of those documents to Mr. Jones in this case.

The Arbitrator finds the following:

1. Timely notice of the accident was given to Respondent. Petitioner had no treatment for his condition prior to June 28, 2010. On July 2, 2010, Petitioner underwent a NCV/EMG. The date of the EMG/NCV is routinely upheld as an appropriate date of accident for repetitive trauma injuries. *See, e.g., Middleton v. St. Anthony's Health Center*, 11 I.W.C.C. 1138, 2011 WL 6282300 (Nov. 18, 2011). On July 16, 2010, Petitioner received the results of the testing and discussed his work activities with Dr. Davis. On July 19, 2010, Petitioner reported his injury. After receiving this notice, Respondent later approved Petitioner's treatment and paid Petitioner TTD benefits.

2. Petitioner sustained an accident that arose out of and in the course of Petitioner's job, as evidenced by Petitioner's medical history, job activities, onset of symptoms while performing his work activities, sequence of events, Petitioner's testimony, the testimony of Dr. Davis, and the reports of Dr. Sudekum.

3. Petitioner's current condition of ill-being is causally related to his work activities, based on Petitioner's testimony, Dr. Davis's testimony, Dr. Sudekum's reports, and Dr. Sudekum's testimony. Petitioner's testimony regarding his job activities, onset of symptoms, and worsening of symptoms is unrebutted. Dr. Davis testified to a reasonable degree of medical certainty that Petitioner's job activities, including rapping bars and turning keys, contributed to Petitioner's condition, which is consistent with the operative findings and Petitioner's reports of symptoms while working. Dr. Sudekum acknowledged that rapping bars and opening doors at Menard can be factors in aggravating carpal tunnel and cubital tunnel syndromes. Dr. Sudekum admitted that pinch grip and vibratory activities can cause symptoms in persons with a constricted median nerve, like Petitioner. Dr. Sudekum admitted that he would find causation if a worker presented with symptoms during or very soon after performing the repetitive activities at Menard. Dr. Sudekum admitted that causation would also be clear if the worker had a nerve conduction study while performing the job of a housing unit officer at Menard. In this case, both situations apply. Petitioner's symptoms worsened while performing the job of a housing unit officer in 2010 when the facility was on lockdown and, further, when he was assigned to that job on June 28, 2010 – the first day he sought treatment from his family doctor. Dr. Sudekum was not provided any information regarding Petitioner's re-assignments to the housing unit while the facility was on lockdown. Petitioner was still engaged in that job when his nerve conduction study was performed. Finally, Dr. Sudekum also acknowledged that turning keys approximately 300 times per shift, even at a more modern facility, could potentially aggravate carpal tunnel syndrome.

4. Respondent shall pay the following reasonable, necessary, and related medical bills, pursuant to the medical bill fee schedule:

Southern Illinois Orthopedic Surgery Center	$8,632.00
Brigham Anesthesia	$ 855.00
Southern Orthopedic Associates	$6,525.00
Healthlink	$ 864.63
Out-of-Pocket	$ 35.00

5. Respondent has paid all TTD benefits and did not dispute that Petitioner was owed these benefits.

6. Respondent shall pay the Petitioner the sum of $655.14/week for a period of 56.05 weeks as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to the extent of 15% of his right hand, and 10% of the right arm.

Date: 2/16/13

Honorable Edward Lee

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Lemons,

Petitioner,

14IWCC0203

vs.

NO: 11 WC 05490

Brockett Farms, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses/other-mileage-under §8(a) and nature & extent of permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner is a 52 year old employee of Respondent, who described his job as a laborer. Petitioner has been working at Respondent for twelve years. Petitioner stated that he works on grain lays and tractors, shovels grain, moves and loads trucks; generally anything that you need to do: farm work. On the date of accident, February 2, 2010, Petitioner testified that they were unloading green beans. Respondent has a main auger that runs to a vertical auger. There are also individual grain bins that feed into the main auger. Petitioner testified that he just finished his work and one of the bins came out. Petitioner went over to start the other bin and the auger coming into the main auger was stopped up so he tried to work the belt to get it freed up. Petitioner stated his foot got down into the main auger that was running and it sucked him into it. Petitioner testified that he had a prior left foot injury in 1983 which required surgery (performed by Dr. John

Barrow) to his left Achilles. Petitioner testified that just prior to this 2012 injury he had not been having any difficulties with his left foot. His prior surgery had been successful. Petitioner testified that prior to February 2, 2010, he was taking pain medication-(Hydrocodone-500mg about 3 per day) for a left shoulder injury, prescribed by Dr. Ewell.

- Petitioner testified that after this left foot injury they took him to the emergency room at Harrisburg where they examined him and x-rayed his foot. Petitioner stated that they did not see any fractures but they did see a small straggle in the steel cable he had in his foot. Petitioner testified that he was referred to Dr. Steven Young in Herrin. Petitioner testified that Dr. Young provided him treatment for his left foot for several months and then referred him to Dr. David Wood, a foot specialist, in the same office. Dr. Wood referred Petitioner to Southern Illinois Pain Management in Marion. Petitioner received physical therapy for this injury at Strictly Rehab in Eldorado, Illinois. Petitioner testified that the doctors at Southern Illinois Pain Management provided him with a series of three injections. In January or February 2011, another doctor there tried three more injections. Petitioner testified that he was scheduled for a fourth injection and he did not undergo that. Petitioner stated that he had taken three injections scheduled a little apart and he took three together as they thought that would work better. Petitioner stated when it did no better; he did not see any reason in taking the fourth injection. Petitioner stated he thought the initial injections helped relieve his pain for maybe a day, but it had been only temporary relief.

- Petitioner agreed with the medical records making several references to him having constant pain in his left foot. Petitioner agreed he repeatedly stated his pain level remained at a 7/10 level. Petitioner testified that the doctors diagnosed him with Complex Regional Pain Syndrome (CRPS) Type II. Petitioner testified that he did not have any of these problems prior to this accident. Petitioner testified that he was currently taking Hydrocodone (dosage increased from 5 to now 10 since his accident). Petitioner stated that depending on the day, and the number of augers he has to work, he usually takes 6-7 Hydrocodone per day as prescribed by Dr. Ewell. Petitioner testified to taking other medication since this accident but did not recall the name of the medication. Petitioner stated that the medications were listed in the medical records and that he would not dispute what was listed as medication in the records. Petitioner's current treatment regimen involves seeing Dr. Ewell every 6-8 weeks. Petitioner indicated that Dr. Ewell gives him injections in the small of his back. Petitioner stated that those injections do not really provide relief for his left foot, but makes the rest of his body feel much better for 3-4 days. Petitioner testified that the problem with his foot has changed his mood and who he is. Petitioner stated that he is not the same person since this accident happened. Petitioner testified that since the accident he has been prescribed Cymbalta (the medication that he previously did not recall) as an anti-depression medication. Petitioner testified he noticed that does help: if he does not take it he is impossible to live with.

- Petitioner testified that prior to this accident he liked to go dance and run, walk and play basketball; he liked to engage in any kind of outdoor activity. Petitioner testified that since this accident, most of the time he does not even try anymore. Petitioner stated that

every once in a while he has to know if it is as bad as it was and he forces himself to do it; to walk, dance, play basketball, the things he always used to do, but the pain level is not worth it anymore. Petitioner stated that whatever he currently tries to do, including his present work duties, hurts all the time, constantly. Petitioner stated that going up and down the stairs, climbing over the tank, moving hoses back and forth all day, and pushing the clutch on the truck, causes unreal pain. Petitioner stated that he feels this pain a few hours into the day and that his pain increases during the day. Petitioner stated that if he does not keep up with the pain medication, he cannot handle the left foot pain.

- Petitioner and his wife had prepared a list of miles he traveled to and from the doctors and other medical providers as a result of his injury. Petitioner testified that he lives two miles east of Omaha, Illinois. He stated Strictly Rehabilitation is in Eldorado, Illinois as is Dr. Ewell. Dr. Young and Dr. Wood are both in Herrin, Illinois. Southern Illinois Pain Management is in Marion, Illinois and Harrisburg Medical Center is in Harrisburg, Illinois.

The Commission finds that Petitioner and his wife had prepared a list of miles (PX 7) he traveled to and from the doctors and other medical providers as a result of his injury. Petitioner testified that he lives two miles east of Omaha, Illinois (population 300). He stated Strictly Rehabilitation is in Eldorado, Illinois as is Dr. Ewell. Dr. Young and Dr. Wood are both in Herrin, Illinois. Southern Illinois Pain Management is in Marion, Illinois and Harrisburg Medical Center is in Harrisburg, Illinois. Petitioner agreed that someone who lives in Omaha, Illinois has to travel to Eldorado to get supplies, groceries, etc. Petitioner has been seeing Dr. Ewell, his family doctor, since before this accident. Petitioner agreed he traveled to Eldorado to see Dr. Ewell prior to the accident. Petitioner agreed that Eldorado is about 15 miles from where Petitioner lives. Petitioner lives in a rural area and clearly has to drive about 15 miles for normal supplies as well as to a good portion of his medical visits (February 2010-March 2011). There are, however, a number of medical visits in excess of 90 miles round trip. As noted by the Arbitrator, the majority of the visits were no further than normal driving for groceries. Petitioner had medical services generally available within a relatively short distance. The evidenced mileage for therapy, for example, of about 15 miles is not excessive. There is nothing unusual or excessive with many of the distances Petitioner traveled which would warrant the award of mileage for normal, relatively short trips. The cases cited by the Arbitrator clearly indicated that 'local' mileage is not considered as reasonable and necessary for reimbursement. For the most part, Petitioner's medical appointments, by that interpretation, are 'local' as most were in the normal course Petitioner would need to travel for normal staples of life. There is no testimony by Petitioner other than the number of miles traveled. Petitioner's testimony clearly implied that most visits, to the family doctor and for treatment, were of a 'local' nature. The Commission notes from Petitioner's exhibit that trips to Dr. Young and Dr. Wood were in excess of 100 miles round trip (10 trips for 1,032.90 miles); the Pain management visits were 96.8 mile round trips, (5 trips for 484 miles); and the Surgical Center trips for block injections were 91.2 mile round trips (7 trips for 638.40 miles). The Commission finds those visits in excess of 90 miles round trip as not local travel for medical care and therefore compensable under §8(a). The evidence and testimony finds that Petitioner meet the burden of proving entitlement to that mileage reimbursement as that mileage was of an unusual or excessive nature, and herein, modifies the

award for reimbursement of that mileage (2,155.3 miles) for those visits at .51 cents per mile; for a total mileage reimbursement of $1,099.20.

Petitioner agreed with the medical records making several references to him having constant pain in his left foot. Petitioner agreed he repeatedly stated his pain level remained at a 7/10 level. Petitioner testified that the doctors diagnosed him with Complex Regional Pain Syndrome (CRPS) Type II. Petitioner testified that he did not have any of these problems prior to this accident. Petitioner testified that he was currently taking Hydrocodone (dosage increased from 5 to now 10 since his accident). Petitioner stated that depending on the day, and the number of augers he has to work, he usually takes 6-7 Hydrocodone per day as prescribed by Dr. Ewell. Petitioner testified to taking other medication since this accident but did not recall the name of the medication. Petitioner stated that the medications were listed in the medical records and that he would not dispute what was listed as medication in the records. Petitioner's current treatment regimen involves seeing Dr. Ewell every 6-8 weeks. Petitioner indicated that Dr. Ewell gives him injections in the small of his back. Petitioner stated that those injections do not really provide relief for his left foot, but makes the rest of his body feel much better for 3-4 days. Petitioner testified that the problem with his foot has changed his mood and who he is. Petitioner stated that he is not the same person since this accident happened. Petitioner testified that since the accident he has been prescribed Cymbalta (the medication that he previously did not recall) as an anti-depression medication. Petitioner testified he noticed that does help; if he does not take it he is impossible to live with. Petitioner testified that prior to this accident he liked to go dance and run, walk and play basketball; he liked to engage in any kind of outdoor activity. Petitioner testified that since this accident, most of the time he does not even try anymore. Petitioner stated that every once in a while he has to know if it is as bad as it was and he forces himself to do it; to walk, dance, play basketball, the things he always used to do, but the pain level is not worth it anymore. Petitioner stated that whatever he currently tries to do, including his present work duties, hurts all the time, constantly. Petitioner stated that going up and down the stairs, climbing over the tank, moving hoses back and forth all day, and pushing the clutch on the truck, causes unreal pain. Petitioner stated that he feels this pain a few hours into the day and that his pain increases during the day. Petitioner stated that if he does not keep up with the pain medication, he cannot handle the left foot pain. The evidence supports Petitioner's testimony of ongoing complaints and also finds the diagnosis of CRPS/RSD resulting in chronic pain from this accident. Petitioner's testimony is unrebutted. Petitioner testified of the things he did prior to this accident that he no longer even attempts to try as he is aware of the consequences. The Commission finds the award of the Arbitrator to be lower than supported by the evidence and testimony. The Commission, therefore, finds that the evidence and testimony supports an award of 37.5% loss of the foot; that award being consistent with prior Commission decisions given Petitioner's ongoing pain complaints with the CRPS/RSD. The evidence and testimony finds Petitioner met the burden of proving entitlement to the increased award. The Commission finds the decision of the Arbitrator, while not totally contrary to the weight of the evidence, is insufficient under the facts and circumstances presented here, and herein, increases the award to 37.5% loss of use of Petitioner's left foot (62.625 weeks at $402.20 for total permanent partial disability award of $25,187.78).

14IWCC0203

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $402.20 per week for a period of 62.625 weeks, as provided in §8(e)(11) of the Act, for the reason that the injuries sustained caused the 37.5% loss of use of Petitioner's left foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,099.20 for medical expenses-(for the excess mileage reimbursement) under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $26,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 5 2014
o-1/23/14
DLG/jsf
45

David L. Gore

Daniel R. Donohoo

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LEMONS, MARK
Employee/Petitioner

Case# **11WC005490**

BROCKETT FARMS, INC
Employer/Respondent

14IWCC0203

On 7/2/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2546 FEIST LAW FIRM LLC
MICHAEL S FEIST
617 E CHURCH ST SUITE 1
HARRISBURG, IL 62946

0693 FEIRICH MAGER GREEN & RYAN
R JAMES GIACONE II
2001 W MAIN ST SUITE 101
CARBONDALE, IL 62903

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0203

Mark Lemons
Employee/Petitioner

v.

Brockett Farms, Inc.
Employer/Respondent

Case # **11** WC **05490**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Herrin**, on **March 21, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **mileage**

FINDINGS 14IWCC0203

On **February 2, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$34,857.68**; the average weekly wage was **$670.34**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$12,519.36** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

ORDER

Petitioner is found to have suffered a permanent injury pursuant to Section 8(e) of the Act. Respondent shall pay Petitioner permanent partial disability benefits of **$402.20**/week for **50.1** weeks, because the injuries sustained caused the **30%** loss of the use of the left foot, as provided in Section 8(e) of the Act.

The Petitioner's request for reimbursement for mileage is denied

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Richard L. Simpson
Signature of Arbitrator

July 1, 2013
Date

JUL - 2 2013

14IWCC0203

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Lemons,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 11 WC 05490**
	)	
Brockett Farms, Inc.,	)	
	)	
Respondent.	)	
	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on February 2, 2010 the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. On that date the Petitioner sustained an accidental injury or was last exposed to an occupational disease that arose out of and in the course of the employment. They further agree that the Petitioner gave the Respondent notice of the accident within the time limits stated in the Act and that the Petitioner's current condition of ill-being is causally connected to the accidental injury sustained.

At issue in this hearing is as follows: (1) the nature and extent of the injury; (2) Is Petitioner entitled to mileage for his travel for medical treatment.

STATEMENT OF FACTS

The Petitioner is employed by the Respondent as a laborer. The Petitioner's job duties include working on tractors, shoveling, loading and emptying grain bins and moving trucks. On February 2, 2010, the Petitioner was working with the main auger and the grain auger. Petitioner was standing on top of an auger guard, helping unplug a feeding auger when his foot went through an open hole on the top of the guard that is meant to be used to maintain and unplug the auger he was standing on. His foot went down to the auger and it drew him forward. It tore the large rubber boot he was wearing on his foot off and nicked the outside part of his lateral malleolus. He remained under there with the auger striking up against his foot and between his foot and the guard. He reported to the Respondent's Section 12 examining doctor that if the guard had been secured properly it probably would have done more damage to his foot. (R. Ex. 1) The auger was stopped after several minutes. Petitioner testified that it was painful.

Petitioner was taken to the emergency room at Harrisburg Medical Center shortly after the accident occurred. Although his foot was markedly swollen, the cut on the side of his ankle did not require stitches. The Petitioner testified that they x-rayed him and nothing was broken but they thought something was wrong with the steel cable in his foot. He was given a wrap for his foot and crutches and a boot. Petitioner had an Achilles tendon tear with orthopedic cables in place twenty-seven years before the current injury.

Medical records from Harrisburg Medical Center indicate that the Petitioner was brought to the emergency room complaining of an injury to his left foot which happened just prior to his arrival. It is noted that Petitioner described his pain as mild, a two or three on a scale of one through ten. The records indicate that there appears to be a superficial contusion on the top of the foot with some small abrasions. (P. Ex.5) X-rays were taken that afternoon which were negative for fracture or dislocation. They did reveal postoperative changes prior Achilles tendon repair and the orthopedic wire being fractured at the level of the calcaneal tuberosity and partially retracted superiorly. Additionally there were degenerative Osteoarthritic changes about the ankle and first metatarsal phalangeal articulation. (P. Ex. 5)

On February 3, 2010, Petitioner saw Dr. Steven Young, at the Southern Illinois Orthopedic Center. Medical records indicate that Petitioner stated that on February 2, while he was working on a farm he got his foot caught in an auger in a hole. He reported to the doctor that he had severe pain and was evaluated at the clinic and referred to Dr. Young. He gave his level of pain at the time as an 8 on a 10 point scale. Petitioner was placed in a walking boot and given crutches prior to seeing Dr. Young. (P. Ex. 2) X-rays of the foot were taken, weight bearing and non weight bearing. Dr. Young observed an area at the base of the second metatarsal that was questionable. Dr. Young ordered a CT scan, kept the Petitioner in the walking boot and non weight bearing status and explained to the Petitioner that he was concerned that Petitioner may have suffered a Lisfranc injury. (P. Ex. 2) Petitioner was taken off of work by Dr. Young. (P. Ex. 2)

On February 9, 2010, a CT scan was consistent with the x-ray. The radiologist noted no acute bone abnormality, osteoarthritis, status post Achilles tendon repair with orthopedic cables in place, the study was negative for fracture or dislocation. (P. Ex. 5)

On February 11, 2010, the Petitioner returned to Dr. Young after having the CT scan for follow-up. At that time Dr. Young reviewed the report, determined that the Petitioner did not have a Lisfranc fracture, but may have had a Lisfranc sprain. At the time Petitioner was still complaining of pain. He was kept in the fracture boot, non weight bearing and told to return in three weeks for further follow-up. He was kept off of work at that time. (P. Ex. 2)

On March 4, 2010, Petitioner returned to Dr. Young, still complaining of pain to the left foot. Dr. Young kept him off of the foot for an additional three to four weeks, ordering the Petitioner to begin therapy. He kept the Petitioner off of work at this time. (P. Ex. 2)

On May 6, 2010, the Petitioner returned to Dr. Young for follow-up. At that time he reported his midfoot feeling better, but he was still having pain in other parts of his foot. Petitioner told Dr. Young that he did not feel that he could return to work at that time. Dr. Young ordered the Petitioner to participate in work hardening for two weeks, five days per week,

with the plan being that the Petitioner return to Dr. Young in two weeks and he should be ready to be returned to work. (P. Ex. 2)

On May 20, 2010, Petitioner was complaining of pain, was given one week off of physical therapy, a Medrol dosepak and told to begin therapy again in one week and return for follow-up in two weeks. (P. Ex. 2)

On June 8, 2010, Dr. Young referred Petitioner to their foot and ankle specialist, Dr. David Wood. (P. Ex. 2) Dr. Wood saw the Petitioner on June 14, 2010, and ordered a bone scan of both feet and ankles. Petitioner was kept off of work at that time and in physical therapy. (P. Ex. 2)

On June 22, 2010, the Petitioner had a 3-Phase Bone Scan of the Feet. The test revealed that angiographic flow images were normal, blood pool sequences were also normal. There was delayed bone phase images which demonstrated mild increased uptake noted about the first metatarsophalangeal articulations and ankles bilaterally, all of which are most likely arthritic in nature. (P. Ex. 5)

On June 28, 2010, Dr. Wood referred the Petitioner to Dr. Paul Juergens, a pain management specialist. Dr. Juergens recommended injections, specifically a Left paravertebral lumbar sympathetic block. Petitioner had two injections, the first on August 2, 2010, which did not provide any relief. (P. Ex. 2) It was believed by the doctors at this time that the Petitioner may be suffering from Complex Regional Pain Syndrome as a result of his injury.

On August 17, 2010, the Petitioner was requesting to return to work. He was returned to work full duty by Dr. Wood. (P. Ex. 2)

On August 23, 2010, the Petitioner had a second injection by Dr. Paul Juergens which gave him relief for three to four weeks. (P. Ex. 2)

On October 25, 2010, the Petitioner had a third injection by Dr. Paul Juergens. When he returned to see Dr. Juergens on November 9, 2010, he reported that the injections had helped, but he ran across the floor earlier this month and he had an increase in pain. Dr. Juergens refilled the Petitioner's prescription for Lidoderm patches. He offered a fourth injection and told the Petitioner to return if he wants the fourth injection. (P. Ex. 2)

Petitioner testified that to date he has not had a fourth injection and he is not planning on having one.

The Respondent had the Petitioner examined pursuant to Section 12 of the Act, by Dr. Gary J. Schmidt, a board certified Orthopedic Surgeon on March 31, 2011. It is the opinion of Dr. Schmidt after taking a history from the Petitioner, doing a physical examination and reviewing the medical records and films that the Petitioner currently suffers from Complex Regional Pain Syndrome or Reflex Empathetic Dystrophy. It is also his opinion that the Petitioner's current condition is as result of the accident of February 2, 2010, and that the Petitioner had not yet reached MMI. He recommended further physical therapy to further increase his functionality. (R. Ex. 1)

The Petitioner testified that he currently sees his primary care physician, Dr. Ewell about every six to eight weeks. Dr. Ewell gives him injections in the small part of his back, they do not help with his foot but the rest of his body feels better.

Petitioner is currently working for the Respondent at the job that he had prior to his injury, having returned there in August of 2010, after requesting to be allowed to return to work. He stated that he has no restrictions because he asked the doctor not to give him any. He stated that no matter what he does his foot hurts, whether it is climbing stairs, walking across the tanks or where ever he has to walk. He states he cannot get through the day without pain medication.

Petitioner testified that prior to the injury he liked to dance, run, walk, play basketball and any other outdoor activity he could think of. He said he no longer pursues these activities because the pain level is so high it is not worth it anymore. He stated that the pain in his foot changed his mood, he takes Cymbalta now, and if he does not take it he is impossible to live with.

Petitioner testified that Petitioner's exhibit number 7 was prepared by him and his wife and is a record of the miles that he had to drive for his doctor appointments and his physical therapy. He testified that Omaha, the town he lives in, is a small town and he and his wife have to travel to Eldorado for groceries and his doctor. It is 15 miles away. His trips for Rehab were 29.11 miles round trip. The various doctors were about 50 miles away as he indicates that those were 100.72 miles round trip. One doctor appointment with Dr. Woods was apparently 126.42 miles roundtrip.

CONCLUSIONS OF LAW

The burden is upon the party seeking an award to prove by a preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987). This includes the nature and extent of the petitioner's injury.

Expenses for travel to the petitioner's own physician in excess of 100 miles each way were proper under Section 8(a) of the Act. *General Tire & Rubber Co. v. Industrial Commission*, 221 Ill.App.3d 641, 582 N.E.2d 744 (5th Dist. 1991) The Court said it was not unreasonable to travel from Mt. Vernon, Illinois to Evansville, Indiana for treatment by a specialist. However, it does not appear that local travel for treatment would be allowed.

What is the Nature and Extent of the Petitioner's Injury?

In this case, the credible evidence showed that Petitioner suffered a crush injury to his left foot on February 2, 2010. He was off work from February 2, 2010, until August 17, 2010, when he asked his doctor to return him to work, full duty. During the time the Petitioner was off of work, he attended physical therapy and work hardening. Had injections and assorted pain medications.

Petitioner testified that even though he has returned to work full duty with no restrictions and he does his job and is able to perform all the duties required of the job, it is not without pain. He testified that he takes pain medication daily. He no longer takes walks or runs, goes dancing or plays basketball or any of the other outdoor activities he enjoyed prior to the injury, the pain is just too much.

Given the nature of the injury the Petitioner suffered to his left foot following the February 2, 2010, incident, and the constant pain he reports, Petitioner is entitled to have and receive from the Respondent compensation for 30% loss of use of the left foot or 50.1 weeks at a weekly PPD rate of $402.20 / per week.

Is the Petitioner Entitled to be Reimbursed for Mileage?

Mileage expenses can be awarded under section 8(a) of the Act pursuant to a reasonableness standard, as discussed at length in *General Tire & Rubber Co. v. Industrial Commission*, 221 Ill.App.3d 641 (1991). There, the Appellate court held the respondent liable for long distance trip mileage of approximately 100 miles, each way, to and from the petitioner's treating physician. However, the Commission has repeatedly held that "the holding in *General Tire & Rubber Co.* is the exception to the rule and that local mileage is not normally deemed to be reasonable and necessary. . ." *Kosinski v Mobile Chemical Co.*, 99 IIC 794. Applying the *General Tire & Rubber Co.* standard to this matter,

The Petitioner testified that he normally has to travel 15 miles one way to go grocery shopping. The trips for physical therapy were slightly less than 15 miles one way. The furthest he travelled was 63 miles one way and that was a onetime occurrence on August 17, 2010, when he saw Dr. Wood at his office in Carbondale.

It is first notable that the overall mileage in this case is while it looks like a large number of miles to be travelling for medical care, it really is not excessive in its scope and range. The Petitioner calculated that he travelled 4826.73 miles for medical treatment for this injury. That is over the period of one year (February 2, 2010, through January 31, 2011). That breaks down to 402 miles per month or less than 95 miles per week. Since the distances that the Petitioner had to travel for his medical treatment do not approach the 100 miles one way the Petitioner is not entitled to reimbursement for his mileage. As Mileage is to be awarded only in unusual or excessive circumstances, the mileage expenses would not be appropriate in this instance.

ORDER OF THE ARBITRATOR

Petitioner is found to have suffered a permanent injury pursuant to Section 8(e) of the Act. Respondent shall pay Petitioner permanent partial disability benefits of **$402.20**/week for **50.1** weeks, because the injuries sustained caused the **30%** loss of the use of the left foot, as provided in Section 8(e) of the Act.

The Petitioner's request for reimbursement for mileage is denied.

Richard L. Simpson
Signature of Arbitrator

July 1, 2013
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Donald Swartz,

Petitioner,

14IWCC0204

vs.

NO: 12 WC 43270

Wright Tree Service,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, "constitutionality of Section 16," and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 26, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

14IWCC0204

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $16,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 7 2014
KWL/vf
O-1/28/14
42

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0204

SWARTZ, DONALD
Employee/Petitioner

Case# **12WC043270**

12WC043271
12WC043272
12WC043273

WRIGHT TREE SERVICE
Employer/Respondent

On 8/26/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0293 KATZ FRIEDMAN EAGLE ET AL
JASON CARROLL
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 2290
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF **ADAMS**)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

19(B)

14IWCC0204

DONALD SWARTZ
Employee/Petitioner

v.

WRIGHT TREE SERVICE
Employer/Respondent

Case # **12** WC **43270**

Consolidated cases: **12 WC 43271; 12 WC 43272; 12 WC 43273**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Quincy**, on **July 3, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☐ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Whether Petitioner's and Respondent's exhibits are admissible?**

14IWCC0204

FINDINGS

On **March 16, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner's average weekly wage was **$841.95**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **1** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$3,929.00** for TTD and maintenance paid, and **$0.00** for other benefits, for a total credit of **$3,929.00**.

Respondent is entitled to a credit of $109.48 under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the fee schedule The medical to be paid is set forth in the Arbitrator's Conclusions Of Law..

Respondent shall pay Petitioner temporary total disability benefits of $561.30/week for 29 weeks, commencing December 13, 2012 through July 3, 2013 as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $109.48 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Penalties have been addressed in the companion case, 12 WC 43271. No additional penalties are awarded in this case.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

D. Ryan McCarthy
Signature of Arbitrator

August 19, 2013
Date

AUG 26 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONALD SWARTZ,	)	**14IWCC0204**
	)	
Petitioner,	)	
	)	
v.	)	**12 WC 43270**
	)	Consolidated cases: 12 WC 43271
	)	12 WC 43272
WRIGHT TREE SERVICE,	)	12 WC 43273
	)	
Respondent.	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

Petitioner's Testimony Regarding his Injury and Initial Treatment

Petitioner, Donald Swartz, testified that he began working for Respondent, Wright Tree Service, in January of 2011. (Transcript p. 45-46). He testified that Respondent is a tree trimming company and they normally trimmed trees out of power lines. (Id. at 45). He testified he was still employed by Respondent in March of 2012 and that his position at that time was journeyman tree trimmer. (Id.). He testified that when he was hired by the Respondent in January of 2011, his position was that of a T4 tree trimmer, which he explained is one step under a journeyman. (Id. at 46).

Petitioner testified that a journeyman tree trimmer should know everything about the job while a T4 trimmer is still learning some aspects of the job. (T. p. 47). As a journeyman tree trimmer, he testified his job duties included trimming trees out of power lines using chain saws, pole saws, hydraulic pole saws, hanger pullers, hand saws, pruners, and other various equipment. (Id.). Petitioner described in detail the different tools used within his trade. (Id. at 48-49; 56-63). Petitioner submitted two photographs depicting Petitioner holding one of the hydraulic stick saws he used for Respondent, which were admitted by the Arbitrator over Respondent's objection. (Id. at 49-52).

The parties stipulated that on March 16, 2012, Petitioner sustained an accident involving his right thumb that arose out of and in the scope of his employment. (Arb. X1). The only issues in dispute in this claim are causal connection, medical bills, temporary total disability, and penalties. (Id.).

Petitioner testified in March of 2012 he noticed a knot on his right thumb getting bigger and bigger. (T. p. 64). He testified he sought treatment for the first time on March 16, 2012 at Quincy Medical Group. (Id.). At that initial visit, the clinician of record, Nathan DeWitt, PA, diagnosed Petitioner with a ganglion mass on his right thumb and advised him it was large enough that surgical excision would be needed. (PX2 p. 20 of 43). Mr.

DeWitt advised Petitioner that he could be set up with Dr. Ethan Philpot for the ganglion surgery. (Id.). Petitioner testified he did not immediately undergo the recommended surgery because his insurance carrier would not pay for it and he did not have the money to pay for it. (T. p. 65).

Petitioner testified that he continued working for Respondent as a journeyman trimmer following his March 16, 2012 visit at Quincy Medical Group. (T. p. 65). He testified he continued doing this same work through November of 2012. (Id. at 66). He testified that as he continued working for Respondent, he noticed the knot on his right thumb was getting bigger and he was still having pain. (Id.).

Petitioner testified that on November 5, 2012, he returned to Quincy Medical Group due to his right thumb. (T. p. 66). Petitioner testified he spoke to the Physicians Assistant, Mr. DeWitt, regarding the type of work he did for Respondent. (Id. at 66-69). Mr. DeWitt noted Petitioner is a tree trimmer for Wright Tree Service and that the ganglion mass had increased in size since his prior visit in March, 2012. (PX2 p. 14 of 43). Mr. DeWitt further explained that the use of tree saws on a daily basis was the probable cause of the ganglion. (Id.). He referred Petitioner to Dr. Philpot for further treatment of his right thumb ganglion mass. (Id. at 39 of 43).

Petitioner continued to work for Respondent following his November 5, 2012 visit with Mr. DeWitt. (T. p. 70). He alleges two additional work-related accidents on November 14, 2012 and one additional accident on November 15, 2012. These three claims are discussed separately in their own Findings of Fact and Conclusions of Law.

Petitioner's Medical Treatment with Dr. Philpot and Return to Work

Pursuant to the referral of Mr. DeWitt, the Petitioner first treated with Dr. Philpot on November 14, 2012 at Quincy Medical Group. (PX2 p. 9 of 43). Dr. Philpot noted Petitioner was there that day due to a large ganglion cyst on his right thumb as well as for some other conditions that are not directly relevant in this claim but are dealt with separately in their own Findings of Fact and Conclusions of Law. Dr. Philpot recommended surgery for the right thumb. (PX2 p. 10 of 43). He advised Petitioner he could return to work in a light duty capacity. (Id. at 37 of 43).

Petitioner testified that he provided a copy of the November 14, 2012 work status note to his general foreman, Jason Bryant. (T. p. 71). He identified Mr. Bryant as the Respondent's representative in the courtroom at the time of this hearing. (Id. at 71-72). He testified that Mr. Bryant would not accept the work status note from him. (Id. at 72). Petitioner testified he returned to work for Respondent and was doing the same basic type of work that he previously described. (Id. at 72-73).

Petitioner testified that he sustained another accident on November 15, 2012 that is discussed separately in its own Findings of Fact and Conclusions of Law in case number 12 WC 43273 involving his right ankle. Because these two claims overlap in time, it is necessary for the Arbitrator to briefly discuss the November 15, 2012 accident. As a

result of his right ankle injury, Petitioner was also provided with work restrictions and was then provided a light duty position with the Respondent. (T. p. 76, 79-80).

Petitioner continued working in a light duty capacity for the Respondent through December 12, 2012. (T. p. 81-82). On that day, Petitioner testified he was advised by Jason Smott, another general foreman with Respondent, that they could no longer accommodate his work restrictions. (Id. at 82-83). Petitioner testified that he has not been asked to return to work for Respondent since he was sent home on December 12, 2012. (Id. at 88). He testified he is no longer employed by Respondent. (Id. at 89).

Petitioner returned to Dr. Philpot on December 17, 2012 for treatment related to his right thumb and other injuries related to separate claims. (PX2 p. 4 of 43). Petitioner was placed on the schedule, at least temporarily, for removal of his right thumb ganglion cyst, pending approval by Respondent. (Id. at 5 of 43). He was provided with work restrictions of no effort level over ten pounds. (Id. at 30 of 43).

Section 12 Examination by Dr. David Fletcher

At the request of Respondent, Petitioner underwent a Section 12 examination performed by Dr. David Fletcher on December 21, 2012. (RX1). Dr. Fletcher testified by way of evidence deposition on April 1, 2013. (RX2). He testified that Petitioner's right thumb condition was causally related to his work for Respondent. (RX2 p. 16-17). He testified the right thumb condition was related to Petitioner's holding the large vibrating tree saws and other various tree cutting devices. (Id. at 17, 39). He testified that he would recommend work restrictions of minimizing vibratory exposure due to Petitioner's right thumb mass until after surgery to remove the mass. (Id. at 23).

Testimony of Jason Bryant

Jason Bryant testified on behalf of Respondent. He testified he is employed by Respondent as a general foreman. (T. p. 157-158). He testified he knows Petitioner because he was his employee. (Id. at 158). He testified around August through October of 2012, there was a discussion amongst his crew about going to Canton, Illinois for a job the following year. (Id. at 158-159). He explained Canton is approximately two hours from Quincy. (Id. at 159). He testified he had a conversation with his employees, including Petitioner, regarding this work in Canton the following year. (Id.).

Mr. Bryant testified Petitioner told him, in response to the planned trip to Canton, that he did not want to go and would just file for workers' compensation. (T. p. 160). He testified that he took this statement from Petitioner as a joke. (Id.). He also testified that Petitioner said this during a morning safety meeting "in front of everyone" and "everybody just got a big joke, a big laugh out of it, but lo and behold." (Id.).

On cross examination, Mr. Bryant testified he and everyone else took Petitioner's statements that he was going to claim workers' compensation rather than go to Canton as a joke and everyone thought it was funny. (T. p. 165).

Testimony of Shaun Thompson

Shaun Thompson testified on behalf of Respondent. He testified he is employed by Respondent as a T3 trainee trimmer. (T. p. 175-176). He testified he never had a direct conversation with Petitioner about working in Canton, Illinois. (Id. at 176). He testified he was with a group of people when Petitioner made a comment about Canton. (Id. at 177). In regards to the comment, he testified, "It was just side bar conversation, a bunch of us just standing around, it was like, I'm not going to Canton - - or I ain't going to Canton, but you know - -". (Id.).

On cross examination, Mr. Thompson testified that whenever the topic of traveling to Canton for the job came up, no one wanted to go. (T. p. 179). He testified he heard Petitioner say he wasn't going to drive to Canton or that he was not going to go. (Id.). He testified, "We were just kind of all joking around, talking…I doubt really anyone wanted to drive (to Canton)." (Id.).

Right Thumb Surgery and Ongoing Treatment

Petitioner contacted Quincy Medical Group by telephone on April 2, 2013 in order to schedule his right thumb surgery. (PX4 p. 18 of 59). They advised him that he would be contacted once they obtained verification from Respondent. (Id.). Dr. Crickard provided a work ability report that date which indicated "no restrictions" but that Petitioner was in need of several surgeries, including excision of the cyst on his right thumb. (Id. at 50 of 59).

On April 23, 2013, Petitioner returned to Quincy Medical Group following approval from Respondent to proceed with surgery on his right thumb. (PX4 p. 9 of 59). At that visit, Dr. Crickard noted the next visit would be surgery. (Id.). He advised Petitioner to remain completely off work from April 26, 2013 through May 9, 2013. (Id. at 49 of 59).

Petitioner underwent surgery to his right thumb performed by Dr. Crickard on April 26, 2013. (PX8 p. 40). During this surgery, Dr. Crickard also operated on his right third and fourth trigger fingers, which are part of case number 12 WC 43271. His first post-surgical follow-up visit with Dr. Crickard was on May 9, 2013. (PX4 p. 3 of 59). Dr. Crickard noted Petitioner's thumb was feeling better and that he was in therapy. (Id.). Dr. Crickard provided Petitioner with work restrictions of no use of his right hand for two weeks. (Id. at 47 of 59).

On May 23, 2013, Petitioner had another follow-up visit with Dr. Crickard. (PX7 p. 12 of 19). He provided Petitioner with ongoing work restrictions of no lifting over five pounds with his right hand and no chainsaw use. (Id. at 19 of 19). Ongoing treatment with Dr. Crickard following that visit was focused on the right trigger fingers. (See PX7). As of June 18, 2013, Dr. Crickard had not yet placed Petitioner at maximum medical improvement for his right thumb injuries. (Id.).

Petitioner testified he notices that his right thumb is still numb on the side and the top and that it is hard to feel with it. (T. p. 86). He testified that he received his first temporary total disability check from Respondent five weeks after April 26, 2013 covering the time period of April 26 through May 23, 2013. (Id. at 92). He testified he received TTD benefits from Respondent through June 13, 2013. (Id. at 93). Petitioner testified he did not return to work anywhere as of June 14, 2013. (Id.).

II. CONCLUSIONS OF LAW

F. WHETHER PETITIONER'S PRESENT CONDITION OF ILL BEING IS CAUSALLY RELATED TO THE ACCIDENT?

The Arbitrator finds that Petitioner's present condition of ill-being as it relates to his right thumb is causally related to his work accident of March 16, 2012.

The Parties stipulated to Petitioner's accident of March 16, 2012 involving his right thumb. The medical records immediately following his accident correlate with the right thumb injury from that date. Petitioner's medical providers, including Mr. DeWitt and Dr. Philpot, as well as Respondent's Section 12 examiner, all agreed that Petitioner's work for Respondent caused or aggravated his right thumb ganglion cyst. Petitioner's medical records and testimony are consistent as to his right thumb injuries and symptoms.

The Arbitrator finds that Petitioner testified credibly and his credibility was not reduced on cross-examination. His current complaints regarding his right thumb remained consistent with the contemporaneous medical records.

Therefore, the Arbitrator finds that Petitioner's right thumb injury is causally related to his work-related accident of March 16, 2012.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

The Arbitrator finds that medical services provided to Petitioner have been reasonable and necessary. Respondent has not paid all appropriate charges.

Respondent stipulated on the record that the right thumb injury was accepted as a work-related injury. Respondent, as noted in the medical records and in the trial transcript, provided authorization for Petitioner's right thumb treatment, including the surgery of April 26, 2013.

Although Petitioner underwent right trigger finger surgeries on that same date, the Arbitrator notes those injuries were also stipulated to and approved by Respondent and are part of case number 10 WC 43271.

The Arbitrator finds that medical services provided to the Petitioner have been reasonable and necessary. The Respondent has not paid all appropriate charges. Many of the charges are enumerated as part of the decision in case number 12 WC 43271, as the Petitioner receive treatment for his thumb and trigger fingers at the same time. In addition, the Respondent is ordered to pay the following bill which pertains to the thumb.

FACILITY	DATE OF SERVICE	CPT	AMOUNT
Quincy Medical Group	April 26, 2013	26160	$1,962.90

For these reasons, Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule, of $1962.90 to Quincy Medical Group l, as provided in Sections 8(a) and 8.2 of the Act.

The Arbitrator notes that these medical bills overlap with those submitted by Petitioner in case number 10 WC 43271, however, Respondent stipulated to both of these accidents and approved surgery and treatment for the related injuries. The Arbitrator shall award these bills in both claims but need only be paid one time by Respondent.

K. WHETHER PETITIONER IS DUE COMPENSATION FOR TEMPORARY TOTAL DISABILITY?

The Arbitrator finds that Petitioner's proposed TTD benefits on the Request for Hearing form are accurate and awards benefits in accordance with those dates.

The parties stipulated that TTD benefits were owed from April 26, 2013 through June 13, 2013. Respondent, however, disputed the periods from December 13, 2012 through April 25, 2013 and June 14, 2013 through July 3, 2013.

An employer's obligation to pay TTD benefits to an injured employee does not automatically cease because the employee has been discharged no matter what the cause of the termination. *Interstate Scaffolding v. Illinois Workers' Compensation Comm'n*, 236 Ill.2d 132, 146, 923 N.E.2d 266, 274 (2010). When an injured employee has been discharged by an employer, the determinative inquiry for deciding entitlement to TTD benefits remains whether the claimant's condition has stabilized. *Id.* If the injured employee has not reached maximum medical improvement, he or she is entitled to TTD benefits. *Id.* The dispositive question in a temporary total disability case is whether the claimant's condition has stabilized and whether physicians still recommend further treatment. See *Freeman v. United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d 170 (2000).

Here, Petitioner had not reached maximum medical improvement and had not been discharged from care when Respondent sent him home on December 12, 2012. To the

contrary, at the time of trial, Petitioner still had not been released at maximum medical improvement by Dr. Crickard in regards to his right thumb injury.

Therefore, the Arbitrator finds that Petitioner is entitled to $561.30/week for a total of 29 weeks of temporary total disability benefits for the time period of December 13, 2012 through July 3, 2013.

The Petitioner is entitled to a total of $16,277.70 in TTD for this time period. The Respondent is owed a credit of $3,929.00 for TTD benefits paid for a total outstanding owed amount to the Petitioner of $12,348.70.

Once again, the periods owed for TTD for the trigger finger injuries and the thumb overlap. Obviously, the Respondent is only responsible for payment of one TTD check for the weeks and parts enumerated.

M. SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPODNENT?

Penalties are addressed in the arbitration decision in 12 WC 43271, one of the companion cases tried by consolidation. No additional penalties are awarded in this case.

O. WHETHER PETITIONER'S AND RESPONDENT'S EXHIBITS ARE ADMISSIBLE AS A MATTER OF LAW?

At trial, Respondent objected to Petitioner's exhibits numbered three through nine for several reasons. The main objection was that Section 16 of the Illinois Workers' Compensation Act, which was the vehicle for introduction of these exhibits, is unconstitutional as violating Respondent's due process rights.

However, the Commission has held on a number of occasions that it does not have authority to rule on constitutional issues. See *Jarabe v American Airlines*, 95 IIC 209; *Javier v. Robinson Bus Company*, 97 IIC 2267; *Starofsky v. Industrial Commission*, 01 IIC 895. The Arbitrator finds the reasoning in those cases persuasive and will not rule that the statute is unconstitutional. Respondent has preserved the issue by raising it and is free to argue it before the Courts which have the authority to rule on it.

Respondent next argued that the certifications contained with the Petitioner's exhibits do not conform with the requirements of Section 16. The Arbitrator finds that the certifications contained with those exhibits are in line with Section 16. They are certified as representing true and correct copies, which is what the Act requires.

With respect to the medical bills, Respondent argued that they are inadmissible because they do not reflect charges under the fee schedule outlined in Section 8.2 of the Act. The fee schedule section states that Respondent is not liable for charges which exceed those under the schedule. If liability is found, Respondent is only responsible for the fee schedule charges. Nothing in Section 8.2 prevents admissibility of the bills submitted.

For these reasons, the Arbitrator admits Petitioner's Exhibits three through nine into evidence.

Finally, Petitioner objected to Respondent's Exhibits numbered four through eleven on the ground that they have not been properly certified. The Arbitrator admits them into evidence pursuant to the reasoning in the *Fencil-Tufo* case. *Fencil-Tufo Chevrolet v. Industrial Commission,* 169 Ill. App.3d 510, 523 N.E.2d 926 (1988). They represent treatment records not prepared for litigation purposes.

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Donald Swartz,

Petitioner,

14IWCC0205

vs.

NO: 12 WC 43273

Wright Tree Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of credit for medical paid and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 26, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 27 2014
Kwl/VF
o-1/28/14
42

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0205

SWARTZ, DONALD
Employee/Petitioner

Case# **12WC043273**

12WC043271
12WC043272
12WC043270

WRIGHT TREE SERVICE
Employer/Respondent

On 8/26/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

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☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

19(B)

14IWCC0205

DONALD SWARTZ
Employee/Petitioner

v.

WRIGHT TREE SERVICE
Employer/Respondent

Case # **12** WC **43273**

Consolidated cases: **12 WC 43270; 12 WC 43271; 12 WC 43272**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Quincy**, on **July 3, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☐ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other **Whether Petitioner's and Respondent's exhibits are admissible?**

14IWCC0205

FINDINGS

On **November 15, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner's average weekly wage was $**841.95**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **1** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD and maintenance paid, and $**0.00** for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the fee schedule, of $439.00 for Blessing Physician Services as provided in Sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

August 19, 2013
Date

ICArbDec p. 2

AUG 26 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONALD SWARTZ,	)	**14IWCC0205**
Petitioner,	)	
v.	)	**12 WC 43273**
	)	Consolidated cases: 12 WC 43270
WRIGHT TREE SERVICE,	)	12 WC 43271
	)	12 WC 43272
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

Petitioner, Donald Swartz, testified that he began working for Respondent, Wright Tree Service, in January of 2011. (Transcript p. 45-46). He testified that Respondent is a tree trimming company and they normally trimmed trees out of power lines. (Id. at 45). He testified he was still employed for Respondent in November of 2012 and that his position at that time was journeyman tree trimmer. (Id.). He testified that when he was hired by Respondent in January of 2011, his position was that of a T4 tree trimmer, which he explained is one step under a journeyman. (Id. at 46).

Petitioner testified that a journeyman tree trimmer should know everything about the job while a T4 trimmer is still learning some aspects of the job. (T. p. 47). As a journeyman tree trimmer, he testified his job duties included trimming trees out of power lines using chain saws, pole saws, hydraulic pole saws, hanger pullers, hand saws, pruners, and other various equipment. (Id.). Petitioner described in detail the different tools used within his trade. (Id. at 48-49; 56-63).

The parties stipulated that on November 15, 2012, Petitioner sustained an accident involving his right ankle that arose out of and in the scope of his employment. (Arb. X4). The only issues in dispute in this claim are causal connection, medical bills, credit, penalties, and admissibility of exhibits. (Id.).

Petitioner testified he injured his right ankle on November 15, 2012 while dragging brush from the backyard to the front yard at a work site. (T. p. 76). He testified that as he stepped off from the driveway, he stepped into a hole or divot and twisted his right ankle. (Id.).

The following day, November 16, 2012, he sought treatment at McDonough District Hospital in Macomb, Illinois. (PX1). He was treated in the emergency room and noted to have pain and swelling in his right ankle after he twisted it at work the previous day.

(Id.). He was diagnosed with a soft tissue injury and discharged with instructions to follow up in two or three days. (Id.).

On November 20, 2012, Petitioner testified he sought treatment with Dr. Daniels with Blessing Physician Services. (T. p. 77). He testified he was accompanied by Jason Bryan, his general foreman, at this visit. (T. p. 71, 77). Dr. Daniels examined Petitioner's right ankle and noted he injured his ATF and possibly CF. (PX6). Dr. Daniels spoke to the Petitioner by telephone after the visit and provided him with certain work restrictions relative to his right ankle. (Id.).

At a follow up visit on December 7, 2012, Dr. Daniels advised Petitioner that for the next three months he needed to be careful while walking on uneven ground due to his right ankle injury. (PX6). He also advised Petitioner to begin a home therapy program and continue with his light duty work restrictions for his ankle until December 14, 2012. (Id.). He advised Petitioner that no follow up visit was necessary unless his symptoms worsened. (Id.).

Petitioner testified he notices that his right ankle still bothers him as of the date of trial. (T. p. 96). He testified it is his understanding that it will continue to bother him for the rest of his life. (Id. at 97).

Testimony of Jason Bryant

Jason Bryant testified on behalf of Respondent. He testified he is employed by Respondent as a general foreman. (T. p. 157-158). He testified he knows Petitioner because he was his employee. (Id. at 158). He testified around August through October of 2012, there was a discussion amongst his crew about going to Canton, Illinois for a job the following year. (Id. at 158-159). He explained Canton is approximately two hours from Quincy. (Id. at 159). He testified he had a conversation with his employees, including Petitioner, regarding this work in Canton the following year. (Id.).

Mr. Bryant testified Petitioner told him, in response to the planned trip to Canton, that he did not want to go and would just file for workers' compensation. (T. p. 160). He testified that he took this statement from Petitioner as a joke. (Id.). He also testified that Petitioner said this during a morning safety meeting "in front of everyone" and "everybody just got a big joke, a big laugh out of it, but lo and behold." (Id.).

On cross examination, Mr. Bryant testified he and everyone else took Petitioner's statements that he was going to claim workers' compensation rather than go to Canton as a joke and everyone thought it was funny. (T. p. 165).

Testimony of Shaun Thompson

Shaun Thompson testified on behalf of Respondent. He testified he is employed by Respondent as a T3 trainee trimmer. (T. p. 175-176). He testified he never had a direct conversation with Petitioner about working in Canton, Illinois. (Id. at 176). He testified

he was with a group of people when Petitioner made a comment about Canton. (Id. at 177). In regards to the comment, he testified, "It was just side bar conversation, a bunch of us just standing around, it was like, I'm not going to Canton - - or I ain't going to Canton, but you know - -". (Id.).

On cross examination, Mr. Thompson testified that whenever the topic of traveling to Canton for the job came up, no one wanted to go. (T. p. 179). He testified he heard Petitioner say he wasn't going to drive to Canton or that he was not going to go. (Id.). He testified, "We were just kind of all joking around, talking...I doubt really anyone wanted to drive (to Canton)." (Id.).

II. CONCLUSIONS OF LAW

F. WHETHER PETITIONER'S PRESENT CONDITION OF ILL BEING IS CAUSALLY RELATED TO THE INJURY?

The Arbitrator finds that Petitioner's present condition of ill-being as it relates to his right ankle is causally related to his work accident of November 15, 2012.

The parties stipulated to Petitioner's accident of November 15, 2012 involving his right ankle. The medical records immediately following his accident correlate with the injury from that date.

The Arbitrator finds that Petitioner testified credibly and his credibility was not reduced on cross-examination. His current complaints regarding his right ankle remained consistent with the contemporaneous medical records. He testified the ankle continues to bother him and that he had not sustained any other accidents involving that same ankle. Therefore, the Arbitrator finds that the Petitioner's right ankle injury is causally related to his work-related accident of November 15, 2012.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

The Arbitrator finds that medical services provided to Petitioner have been reasonable and necessary. Respondent has not paid all appropriate charges.

Respondent stipulated that the right ankle injury was accepted as a work-related accident. Petitioner submitted a bill from Blessing Physician Services related to his treatment with Dr. Daniels on November 20, 2012 and December 7, 2012 in the amount of $439.00. The bills are broken down as follows:

FACILITY	DATE OF SERVICE	CPT	AMOUNT
Blessing Physician Services	November 20, 2012	99203	$306.00
Blessing Physician Services	December 7, 2012	99213	$133.00

For these reasons, Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule, of $439.00 to Blessing Physician Services, as provided in Sections 8(a) and 8.2 of the Act.

The Arbitrator notes Respondent claimed an 8(j) credit of $604.95 but failed to present evidence supporting this claim. On the Request For Hearing, signed by both parties, the Petitioner disputed the Respondent's claim for credit, demanding strict proof thereof. No evidence was presenting showing payments by the Respondent for the bills in question. This credit is therefore denied.

M. SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPODNENT?

The Respondent has failed to show payment of the two bills referenced above, The Arbitrator finds that the Respondent's conduct in not paying the bills does not rise to the level needed for the imposition of penalties under Section 19(k) of the Act. Penalties are denied.

O. WHETHER PETITIONER'S AND RESPONDENT'S EXHIBITS ARE ADMISSIBLE AS A MATTER OF LAW?

At trial, Respondent objected to Petitioner's exhibits numbered three through nine for several reasons. The main objection was that Section 16 of the Illinois Workers' Compensation Act, which was the vehicle for introduction of these exhibits, was unconstitutional as violating Respondent's due process rights.

However, the Commission has held on a number of occasions that it does not have authority to rule on constitutional issues. See *Jarabe v American Airlines*, 95 IIC 209; *Javier v. Robinson Bus Company*, 97 IIC 2267; *Starofsky v. Industrial Commission*, 01 IIC 895. The Arbitrator finds the reasoning in those cases persuasive and will not rule that the statute is unconstitutional. Respondent has preserved the issue by raising it and is free to argue it before the Courts which have the authority to rule on it.

Respondent next argued that the certifications contained with Petitioner's exhibits do not conform with the requirements of Section 16. The Arbitrator finds that the certifications contained with those exhibits are in line with Section 16. They are certified as representing true and correct copies, which is what the Act requires.

With respect to the medical bills, Respondent argued that they are inadmissible because they do not reflect charges under the fee schedule outlined in Section 8.2 of the Act. The fee schedule section states that the Respondent is not liable for charges which exceed those under the schedule. If liability is found, Respondent is only responsible for the fee schedule charges. Nothing in Section 8.2 prevents admissibility of the bills submitted. For these reasons, the Arbitrator admits Petitioner's Exhibits three through nine into evidence.

Finally, Petitioner objected to Respondent's Exhibits numbered four through eleven on the ground that they have not been properly certified. The Arbitrator admits them into evidence pursuant to the reasoning in the Fencil-Tufo case. *Fencil-Tufo Chevrolet v. Industrial Commission,* 169 Ill. App.3d 510, 523 N.E.2d 926 (1988). They represent treatment records not prepared for litigation purposes.

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONALD SWARTZ,

Petitioner,

14IWCC0206

vs.

NO: 12 WC 43271

WRIGHT TREE SERVICE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability benefits, penalties and fees, credit for temporary total disability and maintenance payments , "constitutionality of Section 16," "denial of 14th Amendment right to cross examine physician," and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms and adopts the Arbitrator's award of $5,670.00 in Section 19(l) penalties as a penalty for Respondent's unreasonable delay in the payment of temporary total disability benefits during the period of December 27, 2012 through July 3, 2013, for a period of 189 days. However, based upon a review of the record as a whole, the Commission modifies the Arbitrator's award of Section 19(k) penalties and Section 16 attorney fees.

The Arbitrator's award of Section 19(k) penalties and Section 16 attorney fees included the $6,684.86 in medical bills of Quincy Medical Group, for dates of service of November 14, 2012, December 17, 2012, March 11, 2013, April 2, 2013, April 23, 2013, April 26, 2013, May 9, 2013, and May 23, 2013, and the $9,670.09 medical bills of Blessing Hospital, for a date of service of April 26, 2013. The Commission finds the Quincy Medical Group bills from March 11, 2013, April 2, 2013, April 23, 2013, April 26, 2013, May 9, 2013, and May 23, 2013, and the $9,670.09 medical bills of Blessing Hospital, were erroneously included in calculating the award of Section 19(k) penalties and Section 16 attorney fees.

The Arbitrator included the $6,684.86 in unpaid medical bills of Quincy Medical Group in calculating the award of penalties and fees, based upon the Arbitrator's finding that the bills were submitted to Respondent's workers compensation carrier in a "timely fashion," as evidenced in PX2. However, a review of PX2 fails to support the Arbitrator's conclusion. PX2 contains two "Account Charge Activity Detail" statements. The first statement, which is dated January 9, 2013 reflects $323.47 in outstanding charges, incurred from April 2009 through March 23, 2012, all of which have either been paid or are unrelated to Petitioner's workers compensation claims in issue. Also, significant is that this billing statement lists Petitioner as the "guarantor," and fails to support the Arbitrator's conclusion these bills were ever provided to Respondent, let alone in a "timely fashion."

The second billing statement contained in PX2, which is also dated January 9, 2013, lists $1,646.29 in outstanding charges incurred from November 14, 2012 through December 18, 2012, and lists Respondent as "guarantor." Given that the medical provider billed Respondent directly on January 9, 2013 with regard to the $1,646.29 in charges, all of which are related to his workers' compensation claim, and the fact these bills remain unpaid as of the date of the July 3, 2013 19(b) hearing, the Commission finds Section 19(k) penalties and Section 16 attorney fees are appropriate with regard to these charges, and finds Respondent shall pay Section 19(k) penalties in the amount of 50% of the medical fee schedule amount of the $1,646.29 in medical bills, and pay Section 16 attorney fees in the amount of 20% of the medical fee schedule amount of $1,646.29 in medical bills.

With regard to the additional outstanding and related medical expenses, the Commission notes PX6 contains the only other billing statement from Quincy Medical Group, titled "Account Charge Activity Detail." This billing statement covers the dates of service of January 1, 2013 through June 11, 2003, and includes $11,277.08 in outstanding charges, of which $3,857.61 pertains to Petitioner's unrelated hernia surgery. While Respondent is listed as the "guarantor," the statement itself is dated June 11, 2013. Given that the date of the 19(b) hearing in this matter was July 3, 2013, the Commission finds neither Section 19(k) penalties nor Section 16 attorney fees are appropriate. Section 8.2(d) of the Act provides that where the medical provider bills an employer directly, the employer shall make payment within 30 days of receipt of the bill, as long as it contains substantially of the required data necessary to adjudicate the bill. The Respondent

herein had 30 days from receipt of the bill within which to make payment, and given that it was issued on June 11, 2013, the Commission concludes that as of the date of the July 3, 2013 hearing Respondent was still within the 30 days period within which to make payment on the related charges contained within PX6.

The Arbitrator also included the $9,670.09 in unpaid medical bills of Blessing Hospital (PX9) in calculating the award of penalties and fees, based upon the presumption the bills were sent to Respondent's workers compensation carrier. However, as the Arbitrator noted, "the surgical bill from Blessing Hospital does not contain any information as to where it was sent." The Commission finds Petitioner tendered no credible evidence to support the Arbitrator's presumption that the bills were sent to Respondent's workers compensation carrier. Instead, the bill itself lists Petitioner as the "guarantor." In addition, the billing statement is dated July 1, 2013. Even assuming this billing statement was issued to Respondent on July 1, 2013, under Section 8.2(d) of the Act Respondent had 30 days from receipt of the bill within which to make payment. As of the date of the July 3, 2013 19(b) hearing, Respondent was still within the 30 day time period within which to make payment on the related charges contained within PX6.

Accordingly, the Commission affirms the Arbitrator's award of Section 16 attorney's fees in the amount of $2,469.74 for nonpayment of TTD($12,348.70 x 20%). The Commission modifies the award of Section 16 attorney's fees from 20% of the medical fee schedule amount of the total outstanding bills of $16,354.95, to 20% of the medical fee schedule amount of the $1,646.29 in medical bills listed in the second January 9, 2013 billing statement in PX2. Furthermore, the Commission modifies the Arbitrator's award of Section 19(k) penalties from 50% of the medical fee schedule amount of $16,354.95, to 50% of the medical fee schedule of $1,646.29 in medical bills listed in the second January 9, 2013 billing statement in PX2. Finally, the Commission affirms the Arbitrator's award of Section 19(l) penalties in the amount of $5,670.00 ($30.00 x 189 days) based upon Respondent's failure to pay TTD benefits without a reasonable basis for the period of December 13, 2012 through July 3, 2013 .

IT IS THEREFORE ORDERED BY THE COMMISISON that the Decision of the Arbitrator filed August 26, 2013, as modified herein, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $561.30 per week for a period of 29 weeks, for the period of December 13, 2012 through July 3, 2013, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $16,354.95 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of 50% of the medical fee schedule amount of the outstanding medical bills of $1,646.29, as provided in §19(k) of the Act,.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $5,670.00 as provided in §19(l) of the Act, based upon Respondent's unreasonable delay in the payment of temporary total disability benefits during the period of December 27, 2012 through July 3, 2013, for a period of 189 days.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the attorney for the Petitioner legal fees in the amount of 20% of the medical fee schedule of $1,646.29 as provided in §16 of the Act; the balance of attorneys' fees to be paid by Petitioner to his attorney.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $35,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 7 2014
KWL/kmt
O-01/28/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0206

SWARTZ, DONALD
Employee/Petitioner

Case# **12WC043271**

12WC043270
12WC043272
12WC043273

WRIGHT TREE SERVICE
Employer/Respondent

On 8/26/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0293 KATZ FRIEDMAN EAGLE ET AL
JASON CARROLL
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 2290
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF **ADAMS**)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

19 (B)

14IWCC0206

DONALD SWARTZ
Employee/Petitioner

v.

Case # **12** WC **43271**

Consolidated cases: **12 WC 43270; 12 WC 43272; 12 WC 43273**

WRIGHT TREE SERVICE
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Quincy**, on **July 3, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☐ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Shall Respondent authorize prospective medical treatment? P. Whether Petitioner's and Respondent's exhibits are admissible?**

FINDINGS

On **November 14, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner's average weekly wage was **$841.95**.

On the date of accident, Petitioner was **44** years of age, *married* with **1** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$3,929.00** for TTD and maintenance paid, and **$0.00** for other benefits, for a total credit of **$3,929.00**.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the fee schedule, of $6,684.86 for Quincy Medical Group and $9,670.09 for Blessing Hospital as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $561.30/week for 29 weeks, commencing December 13, 2012 through July 3, 2013 as provided in Section 8(b) of the Act.

Respondent shall pay to Petitioner penalties and attorneys' fees as outlined in the Findings of Fact and Conclusions of Law and as provided in Sections 16, 19(k), 19(l) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

D. [illegible]
Signature of Arbitrator

August 19, 2013
Date

AUG 26 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONALD SWARTZ,	)	**14IWCC0206**
	)	
Petitioner,	)	
	)	
v.	)	**12 WC 43271**
	)	Consolidated cases: 12 WC 43270
	)	12 WC 43272
WRIGHT TREE SERVICE,	)	12 WC 43273
	)	
Respondent.	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

Petitioner's Testimony Regarding his Injury and Initial Treatment

Petitioner, Donald Swartz, testified that he began working for Respondent, Wright Tree Service, in January of 2011. (Transcript p. 45-46). He testified that Respondent is a tree trimming company and they normally trimmed trees out of power lines. (Id. at 45). He testified he was still employed for Respondent in November of 2012 and that his position at that time was journeyman tree trimmer. (Id.). He testified that when he was hired by Respondent in January of 2011, his position was that of a T4 tree trimmer, which he explained is one step under a journeyman. (Id. at 46).

Petitioner testified that a journeyman tree trimmer should know everything about the job while a T4 trimmer is still learning some aspects of the job. (T. p. 47). As a journeyman tree trimmer, he testified his job duties included trimming trees out of power lines using chain saws, pole saws, hydraulic pole saws, hanger pullers, hand saws, pruners, and other various equipment. (Id.). Petitioner described in detail the different tools used within his trade. (Id. at 48-49; 56-63). Petitioner submitted two photographs depicting Petitioner holding one of the hydraulic stick saws he used for Respondent, which were admitted by the Arbitrator over the Respondent's objection. (Id. at 49-52).

The Parties stipulated that on November 14, 2012, Petitioner sustained an accident that arose out of and in the scope of his employment. (Arb. X2). However, Respondent only stipulated to the accident involving bilateral ring and middle trigger fingers. (Id. and T. p. 7). Respondent disputed any injury to the wrists or upper extremities. (Id.). The issues in dispute are accident except for the trigger fingers, notice, causal connection, medical, temporary total disability, penalties, and prospective medical. (T. p. 8).

Petitioner first treated with Dr. Philpot at Quincy Medical Group on November 14, 2012. (PX2 p. 9 of 43). Dr. Philpot noted Petitioner was there that day due to finger triggering, pain in both wrists, both elbows, and some pain in both shoulders. (Id.). Dr. Philpot also

noted a large ganglion cyst on Petitioner's right thumb, which is the subject of case number 12 WC 43270 and will not be dealt with directly in this claim. (Id.). Dr. Philpot also noted Petitioner works for a tree service. (Id.).

Dr. Philpot diagnosed Petitioner with bicipital tendinitis bilaterally, trapezium metacarpal arthritis bilaterally, a right thumb cystic mass, and bilateral trigger fingers. (PX2 p. 10 of 43). He recommended steroid shots for the trapeziometacarpal arthritis and therapy for the biciptal tendinitis. (Id.). Petitioner was provided with a work status report at that visit and testified he attempted to provide it to his general foreman, Mr. Bryant, but he would not accept it. (T. p. 71-72). He identified Mr. Bryant as the Respondent's representative in the courtroom at the time of this hearing. (Id. at 71-72). Petitioner, through his attorneys, filed an Application for Adjustment of Claim for this accident date at the Illinois Workers' Compensation Commission on December 17, 2012. (ArbX6).

Petitioner testified that he sustained another accident on November 15, 2012 that is discussed separately in its own Findings of Fact and Conclusions of Law in case number 12 WC 43273 involving his right ankle. Because these two claims overlap in time, it is necessary for the Arbitrator to briefly discuss the November 15, 2012 accident. As a result of his right ankle injury, Petitioner was also provided with work restrictions and was then provided a light duty position with the Respondent. (T. p. 76, 79-80).

Petitioner continued working in a light duty capacity for Respondent through December 12, 2012. (T. p. 81-82). On that day, Petitioner testified he was advised by Jason Smott, another general foreman with Respondent, that they could no longer accommodate his work restrictions. (Id. at 82-83). Petitioner testified that he has not been asked to return to work for Respondent since he was sent home on December 12, 2012. (Id. at 88). He testified he is no longer employed by Respondent. (Id. at 89).

Petitioner returned to Dr. Philpot on December 17, 2012 for treatment related to his bilateral fingers, hands, arms, and shoulder injuries. (PX2 p. 4 of 43). Dr. Philpot provided Petitioner with a physical examination and noted bilateral positive Tinel's and Phalen's at the median nerve at the carpal tunnels. (Id. at 5 of 43). He noted Petitioner had a number of issues including bilateral carpal tunnel syndrome, bilateral bicipital tendinitis, and right thumb ganglion. (Id. at 4 of 43). He placed Petitioner, at least temporarily, on the schedule for carpal tunnel surgery and removal of the right thumb mass. (Id. at 5 of 43). Petitioner was also provided with work restrictions of no effort level over ten pounds. (Id. at 30 of 43).

Section 12 Examination by Dr. David Fletcher

At the request of the Respondent, the Petitioner underwent a Section 12 examination performed by Dr. David Fletcher on December 21, 2012. (RX1). Dr. Fletcher testified by way of evidence deposition on April 1, 2013. (RX2).

Dr. Fletcher testified that he performed a "very thorough examination of the upper extremities and cervical spine" of Petitioner. (RX2 p. 17). He testified the physical

examination was basically normal in the upper extremities except Petitioner had trigger finger in both hands and the right thumb mass. (Id. at 18). He testified the neurological examination for such conditions as carpal tunnel syndrome was negative. (Id. at 18). Dr. Fletcher testified he performed the Tinel's and Phalen's test and both were negative. (Id.).

Dr. Fletcher testified Petitioner was positive for triggering of the third and fourth fingers bilaterally based upon his physical examination. (RX2 p. 18). He testified that the trigger fingers were causally connected to his employment by Respondent. (Id. at 19-20). He explained that vibration exposure from the saws and constant pressure can cause trigger finger. (Id.).

During his deposition, a letter dated December 14, 2012 and signed by Respondent's attorney addressed to Dr. Fletcher was admitted as an exhibit without objection by Respondent. (RX2 PetDepX6). The letter indicated, "Mr. Swart (sic) is employed by Wright Tree Service. He has identified four injuries which were not timely reported and are questionable to say the least." (Id.). The letter also indicated a claimed accident date of December 7, 2012 for cumulative wrist pain. (Id.).

On cross examination, Dr. Fletcher agreed that the use of the same type of chain saws used by Petitioner in his work with Respondent can cause or aggravate carpal tunnel syndrome. (Id. at 44-45). He testified that hypothetically, someone working in Petitioner's job could contract carpal tunnel syndrome. (Id. at 66). He testified, however, that he did not believe Petitioner had carpal tunnel syndrome when he examined him. (Id. at 45). He did agree, however, that two physicians can reach different conclusions when examining the same patient. (Id.).

Testimony of Jason Bryant

Jason Bryant testified on behalf of Respondent. He testified he is employed by Respondent as a general foreman. (T. p. 157-158). He testified he knows Petitioner because he was his employee. (Id. at 158). He testified around August through October of 2012, there was a discussion amongst his crew about going to Canton, Illinois for a job the following year. (Id. at 158-159). He explained Canton is approximately two hours from Quincy. (Id. at 159). He testified he had a conversation with his employees, including Petitioner, regarding this work in Canton the following year. (Id.).

Mr. Bryant testified Petitioner told him, in response to the planned trip to Canton, that he did not want to go and would just file for workers' compensation. (T. p. 160). He testified that he took this statement from Petitioner as a joke. (Id.). He also testified that Petitioner said this during a morning safety meeting "in front of everyone" and "everybody just got a big joke, a big laugh out of it, but lo and behold." (Id.).

On cross examination, Mr. Bryant testified he and everyone else took Petitioner's statements that he was going to claim workers' compensation rather than go to Canton as a joke and everyone thought it was funny. (T. p. 165).

Testimony of Shaun Thompson

Shaun Thompson testified on behalf of Respondent. He testified he is employed by Respondent as a T3 trainee trimmer. (T. p. 175-176). He testified he never had a direct conversation with Petitioner about working in Canton, Illinois. (Id. at 176). He testified he was with a group of people when Petitioner made a comment about Canton. (Id. at 177). In regards to the comment, he testified, "It was just side bar conversation, a bunch of us just standing around, it was like, I'm not going to Canton - - or I ain't going to Canton, but you know - -". (Id.).

On cross examination, Mr. Thompson testified that whenever the topic of traveling to Canton for the job came up, no one wanted to go. (T. p. 179). He testified he heard Petitioner say he wasn't going to drive to Canton or that he was not going to go. (Id.). He testified, "We were just kind of all joking around, talking…I doubt really anyone wanted to drive (to Canton)." (Id.).

Ongoing Treatment Following Section 12 Examination

Following the Section 12 examination by Dr. Fletcher, Petitioner continued treating for the injuries related to this claim as well as for injuries related to the other three consolidated claims. On February 25, 2013, he underwent a hernia surgery, which is the subject of case number 12 WC 43272. As discussed above, he underwent an EMG test performed by Dr. Douglas Sullivant at Quincy Medical Group pursuant to the referral of Drs. Philpot and Crickard. (PX4 p. 53 of 59). Dr. Sullivant noted the test revealed "evidence of bilateral upper extremity median nerve compression neuropathy at the wrist (Carpal Tunnel Syndrome)." (Id. at 55 of 59).

Petitioner returned to Dr. Crickard on April 2, 2013. (PX4 p. 20 of 59). Dr. Crickard reviewed and noted the March 26, 2013 EMG test and noted it showed moderate carpal tunnel on both sides. (Id.). He further noted the bilateral triggering in both ring and long fingers of Petitioner. (Id.). Dr. Crickard recommended bilateral carpal tunnel release surgery and bilateral ring and long trigger finger releases. (Id. at 20 and 50 of 59).

On April 23, 2013, Petitioner returned to Quincy Medical Group following approval from Respondent to proceed with surgery on his right thumb and right trigger fingers. (PX4 p. 9 of 59). At that visit, Dr. Crickard noted the next visit would be surgery. (Id.). He advised the Petitioner to remain completely off work from April 26, 2013 through May 9, 2013. (Id. at 49 of 59).

Dr. Crickard performed surgery on Petitioner's right thumb and right third and fourth trigger fingers on April 26, 2013. (PX8 p. 40). Petitioner followed up with Dr. Crickard on May 9, 2013. (PX4 p. 3 of 59). Dr. Crickard noted Petitioner's right middle finger continued to stick down on occasion. (Id.). He further noted Petitioner may need further release if it did not work its way out over time. (Id.).

At his next visit on May 23, 2013, Dr. Crickard provided Petitioner with a right middle trigger finger injection due to continued triggering following surgery. (PX7 p. 12 of 19). He also provided Petitioner with an updated work status note indicating no lifting over five pounds with his right hand and no chainsaw use. (Id. at 19 of 19).

On June 6, 2013, Dr. Crickard recommended a further release of the right middle trigger finger due to continued triggering. (PX7 p. 7 of 19). He provided Petitioner with a work ability report indicating no use of his right hand and that they needed approval for the second right middle trigger finger release. (Id. at 18 of 19).

Petitioner testified he notices that his right and left hands still continue to bother him and hurt. (T. p. 95). He testified when he wakes up in the morning, his fingers are still locking down and that his arms hurt. (Id.). He testified his right middle finger still triggers since his surgery and the right ring finger is still stiff. (T. p. 86). He testified he wants to undergo the second surgery on his right middle finger as recommended by Dr. Crickard. (T. p. 88 and PX7 p. 7 of 19).

Petitioner testified he received his first temporary total disability check from the Respondent five weeks after April 26, 2013 covering the time period of April 26 through May 23, 2013. (Id. at 92). He testified he received TTD benefits from Respondent through June 13, 2013. (Id. at 93). Petitioner testified he did not return to work anywhere as of June 14, 2013. (Id.).

II. CONCLUSIONS OF LAW

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT ON NOVEMBER 14, 2012?

The Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment by Respondent on November 14, 2012 involving his bilateral ring and middle trigger fingers.

The parties stipulated to Petitioner's accident of November 14, 2012 but only as it pertained to his bilateral middle and ring trigger fingers. Respondent disputed Petitioner's accident as it pertains to his bilateral carpal tunnel syndrome.

Petitioner testified in great detail to the type of work he performed at Wright Tree Service as a journeyman tree trimmer working eight to ten hours per day, four or five days per week, depending on the season.

He testified that he used a number of tools on the job as is indicated above. He said that he used the tools when he worked up in the bucket, which he did on every other tree. When not in the bucket, he would assist his co-worker in that position by providing him tools. He also would clean up the area on the ground, removing the branches which had fallen.

He did not quantify his use of the chain saw. He did say that the tool he used the most, 80 to 85% of the time, was the hydraulic stick saw, depicted in Petitioner's exhibits 11 and 12. There was no testimony whether there was any vibration or positioning of the wrists in an awkward position the hydraulic saw. Pet. Exhibit 11 is a photo of the Petitioner using the saw. It shows his arms outstretched while holding the saw with both hands. His wrists do not appear to be in a flexed position.

No medical evidence was offered on the issue of whether the Petitioner's work was causally related to carpal tunnel syndrome. Dr. Fletcher did testify on cross exam that vibration could be a cause of the condition, but, as stated above, there was no evidence that the Petitioner was exposed to vibration other than when he used the chain saw for unspecified periods of time.

Under the circumstances, the Arbitrator holds that the Petitioner has failed to prove an accident arising out of his employment causally related to carpal tunnel syndrome, and his claim for benefits for that condition is denied. The Arbitrator finds an accidental injury arising out of the Petitioner's employment involving the middle and ring fingers, bilaterally.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

The Arbitrator finds that medical services provided to Petitioner have been reasonable and necessary. Respondent has not paid all appropriate charges.

Respondent stipulated on the record that the bilateral middle and ring trigger fingers were accepted as work-related injuries. Respondent, as noted in the medical records and in the trial transcript, provided authorization for Petitioner's right trigger fingers treatment, including the surgery of April 26, 2013. The Arbitrator finds that all related trigger finger treatment shall be paid by Respondent, including the surgeries of April 26, 2013.

Although Petitioner underwent right thumb surgery on that same date, the Arbitrator notes that injury was also stipulated to and approved by Respondent and is part of case number 10 WC 43270.

The Respondent is not responsible for charges related to the Petitioner's carpal tunnel syndrome.

The Arbitrator finds that medical services provided to Petitioner have been reasonable and necessary. The Respondent has not paid all appropriate charges. The awarded bills are broken down as follows:

FACILITY	DATE OF SERVICE	CPT	AMOUNT

Quincy Medical Group	November 14, 2012	85025	$46.78
Quincy Medical Group	November 14, 2012	80053	$77.42
Quincy Medical Group	November 14, 2012	36415	$18.65
Quincy Medical Group	November 14, 2013	99243	$331.63
Quincy Medical Group	December 17, 2012	76881	$330.44
Quincy Medical Group	December 17, 2012	80053	$77.42
Quincy Medical Group	December 17, 2012	36415	$18.65
Quincy Medical Group	December 17, 2013	85025	$46.78
Quincy Medical Group	December 17, 2012	73130	$119.52
Quincy Medical Group	December 17, 2012	99213	$161.00
Quincy Medical Group	March 11, 2013	99212	$99.84
Quincy Medical Group	April 2, 2013	99202	$171.60
Quincy Medical Group	April 23, 2013	99213	$0.00
Quincy Medical Group	April 23, 2013	85025	$48.66
Quincy Medical Group	April 23, 2013	36415	$19.40
Quincy Medical Group	April 26, 2013	26055	$2,127.34
Quincy Medical Group	April 26, 2013	26055	$2,127.34
Blessing Hospital	April 26, 2013	Multiple	$9,670.09
Quincy Medical Group	May 9, 2013	99024	$0.00
Quincy Medical Group	May 23, 2013	99024	$0.00
Quincy Medical Group	May 23, 2013	J1030	$9.61
Quincy Medical Group	May 23, 2013	20550	$202.98

For these reasons, Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule as outlined above, to said medical providers, as provided in Sections 8(a) and 8.2 of the Act. The Arbitrator notes that these medical bills overlap with those submitted by Petitioner in case number 10 WC 43270, however, Respondent stipulated to both of these accidents and approved surgery and treatment for the related injuries. The Arbitrator shall award these bills in both claims but need only be paid one time by Respondent.

K. WHETHER PETITIONER IS DUE COMPENSATION FOR TEMPORARY TOTAL DISABILITY PAYMENTS?

The Arbitrator finds that Petitioner's proposed TTD benefits on the Request for Hearing form are accurate and awards benefits in accordance with those dates.

The parties stipulated that TTD benefits were owed from April 26, 2013 through June 13, 2013. Respondent, however, disputed the periods from December 13, 2012 through April 25, 2013 and June 14, 2013 through July 3, 2013.

An employer's obligation to pay TTD benefits to an injured employee does not automatically cease because the employee has been discharged no matter what the cause of the termination. *Interstate Scaffolding v. Illinois Workers' Compensation Comm'n*, 236 Ill.2d 132, 146, 923 N.E.2d 266, 274 (2010). When an injured employee has been discharged by an employer, the determinative inquiry for deciding entitlement to TTD

benefits remains whether the claimant's condition has stabilized. *Id.* If the injured employee has not reached maximum medical improvement, he or she is entitled to TTD benefits. *Id.* The dispositive question in a temporary total disability case is whether the claimant's condition has stabilized and whether physicians still recommend further treatment. See *Freeman v. United Coal Mining Company v. Industrial Commission*, 318 Ill.App.3d 170 (2000).

Here, Petitioner had not reached maximum medical improvement and had not been discharged from care when Respondent sent him home on December 12, 2012. To the contrary, at the time of trial, Petitioner still had not been released at maximum medical improvement by Dr. Crickard in regards to his bilateral middle and ring trigger fingers or his bilateral carpal tunnel syndrome.

Therefore, the Arbitrator finds that the Petitioner is entitled to $561.30/week for a total of 29 weeks of temporary total disability benefits for the time period of December 13, 2012 through July 3, 2013.

Petitioner is entitled to a total of $16,277.70 in TTD for this time period. Respondent is owed a credit of $3,929.00 for TTD benefits paid for a total outstanding owed amount to Petitioner of $12,348.70.

M. SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPODNENT?

The Arbitrator finds that penalties and fees shall be imposed upon Respondent pursuant to Sections 16, 19(k), and 19(l) of the Act.

As discussed above, it is well settled that an employer's obligation to pay TTD benefits to an injured employee continues until the Petitioner has reached maximum medical improvement. Here, it is undisputed that Petitioner was in need of treatment for his bilateral trigger fingers syndrome when he was sent home by Respondent on December 12, 2012. Respondent arbitrarily decided to withhold TTD benefits until Petitioner's surgery date of April 26, 2013. It must also be stated that the delay in surgery was due to Respondent determining whether or not they would provide the necessary authorization. Further, even though Respondent agreed to pay TTD as of April 26, 2013, Petitioner did not receive his first check until five weeks after his surgery date.

The Respondent offers no legitimate explanation as to why benefits were not paid. Their examining physician, Dr. Fletcher, opined that the Petitioner's finger conditions required surgery and that work restrictions were needed. As stated above, Dr. Phillpot had made the same recommendations. The fact that the Petitioner also had restrictions for a hernia, which the Arbitrator has ruled is not compensable, does not provide the Respondent an excuse for non- payment of benefits.

The Arbitrator also awards penalties and fees associated with the unpaid medical bills of Quincy Medical Group and Blessing Hospital. The Respondent argues that it did not

receive the bills until the matter was arbitrated. The evidence shows that the bills were submitted to WC by the Quincy Medical Group in a timely fashion. (PX 2) While the surgical bill from Blessing Hospital does not contain any information as to where it was sent, the Arbitrator logically presumes that they were also directed to send the bill to WC.

For these reasons, the Arbitrator finds Petitioner has proven by a preponderance of the evidence entitlement to penalties under Sections 19(k) and 19(l) and attorneys' fees under Section 16. Respondent should pay penalties and fees as outlined below:

Section 16 attorney's fees in the amount of 20% of the medical fee schedule amount of the total outstanding bills of $16,354.95 and Section 16 in the amount of $2,469.74 for nonpayment of TTD benefits ($12,348.70 x 20%).

Section 19(k) in the amount of 50% of the medical fee schedule amount of the total outstanding bills of $16,354.95; and

Section 19(l) in the amount of $5,670.00 ($30.00 x 189 days between December 27, 2012 and the date of hearing July 3, 2013, which began to accrue 14 days after the Respondent failed to issue TTD benefits without a reasonable basis as of December 13, 2012.).

O. WHETHER RESPONDENT SHALL AUTHORIZE BILATERAL CARPAL TUNNEL RELEASE SURGERIES, RIGHT MIDDLE TRIGGER FINGER RELEASE SURGERY, AND LEFT MIDDLE AND RING TRIGGER FINGER RELEASE SURGERIES?

The Arbitrator finds that Respondent need not authorize the recommended carpal tunnel release surgeries, as they were not shown to be causally related to the Petitioner's work. The Respondent is to authorize the left middle and ring trigger finger release surgeries, and right middle finger release surgery.

Petitioner's current treating physician, Dr. George Crickard, and Respondents' Section 12 Examiner, Dr. David Fletcher, both agree that Petitioner is in need of trigger finger surgeries. Although Dr. Fletcher testified Petitioner does not have bilateral carpal tunnel syndrome, two treating surgeons and an objective EMG test disagree.

Therefore, the Arbitrator finds that Respondent shall authorize the surgeries for left middle and ring trigger finger releases, and right middle trigger finger release.

P. WHETHER PETITIONER'S AND RESPONDENT'S EXHIBITS ARE ADMISSIBLE AS A MATTER OF LAW?

At trial, Respondent objected to Petitioner's exhibits numbered three through nine for several reasons. The main objection was that Section 16 of the Illinois Workers' Compensation Act, which was the vehicle for introduction of these exhibits, was unconstitutional as violating Respondent's due process rights.

However, the Commission has held on a number of occasions that it does not have authority to rule on constitutional issues. See *Jarabe v American Airlines*, 95 IIC 209; *Javier v. Robinson Bus Company*, 97 IIC 2267; *Starofsky v. Industrial Commission*, 01 IIC 895. The Arbitrator finds the reasoning in those cases persuasive and will not rule that the statute is unconstitutional. Respondent has preserved the issue by raising it and is free to argue it before the Courts which have the authority to rule on it.

Respondent next argued that the certifications contained with Petitioner's exhibits do not conform with the requirements of Section 16. The Arbitrator finds that the certifications contained with those exhibits are in line with Section 16. They are certified as representing true and correct copies, which is what the Act requires.

With respect to the medical bills, Respondent argued that they are inadmissible because they do not reflect charges under the fee schedule outlined in Section 8.2 of the Act. The fee schedule section states that the Respondent is not liable for charges which exceed those under the schedule. If liability is found, Respondent is only responsible for the fee schedule charges. Nothing in Section 8.2 prevents admissibility of the bills submitted. For these reasons, the Arbitrator admits Petitioner's Exhibits three through nine into evidence.

Finally, Petitioner objected to Respondent's Exhibits numbered four through eleven on the ground that they have not been properly certified. The Arbitrator admits them into evidence pursuant to the reasoning in the Fencil-Tufo case. *Fencil-Tufo Chevrolet v. Industrial Commission,* 169 Ill. App.3d 510, 523 N.E.2d 926 (1988). They represent treatment records not prepared for litigation purposes.

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

14IWCC0207

Donald Swartzz,
Petitioner,
vs.

NO: 12 WC 43272

Wright Tree Service,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, accident medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 26, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 27 2014
KWL/vf
O-1/28/14
42

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0207

SWARTZ, DONALD
Employee/Petitioner

Case# 12WC043272

12WC043271
12WC043270
12WC043273

WRIGHT TREE SERVICE
Employer/Respondent

On 8/26/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0293 KATZ FRIEDMAN EAGLE ET AL
JASON CARROLL
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 2290
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF ADAMS)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0207

Donald Swartz
Employee/Petitioner

v.

Wright Tree Service
Employer/Respondent

Case # 12 WC 43272

Consolidated cases: 12 WC 43270, 12 WC 73271, 12 WC 73273

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Douglas McCarthy, Arbitrator of the Commission, in the city of Quincy, on July 3, 2013 After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Whether Section 16 of the Act is unconstitutional based on denial of Respondent's right to cross examine treating doctors.**

14IWCC0207

FINDINGS

On the date of accident, November 14, 2012, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did not sustain an accident that arose out of and in the course of employment.

Timely notice of this accident N/A given to Respondent.

Petitioner's current condition of ill-being N/A causally related to the accident.

In the year preceding the injury, Petitioner earned $43,781.40; the average weekly wage was $841.95.

On the date of accident, Petitioner was 44 years of age, married with one dependent child.

Respondent has paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ -0- for TTD, $ -0-for TPD, $ -0- for maintenance, and $ -0- for other benefits, for a total credit of $ -0-.

Respondent is entitled to a credit of $ under Section 8(j) of the Act.

ORDER

The petitioner failed to prove that he sustained accidental injuries arising out of and in the course of his employment.

Petitioner's exhibits 3 through 9 and Respondent's exhibits 4 through 11 are admitted into evidence.

All claims for compensation or penalties are denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

Aug 19, 2013
Date

ICArbDec19(b)

AUG 26 2013

DONALD SWARTZ V. WRIGHT TREE SERVICES
12 WC 43272

As to the issue of **whether an accident occurred that arose out of and in the course of the petitioner's employment by the Respondent,** the Arbitrator finds the following:

The petitioner, in 2009, underwent a hernia repair by Dr. Petty.

The petitioner testified that on November 14, 2012, he was moving wood that his foreman told him to move when he felt pain in his stomach. He testified that he reported it to his foreman on that date, a Mr. Nathan Davis. He testified that he had a sharp pain in his stomach, thinking that he pulled a muscle or something. He testified that his foreman told him to sit down for a while, take a break, see what happens, walk it off and see if it hurt anymore.

The petitioner testified that he went to Quincy Medical Group that day for his fingers, thumbs and hands and that he told the doctor about his stomach pain.

The petitioner did call Nathan Davis as a witness at the Arbitration Hearing. Nathan Davis testified that he last worked for Wright Tree Services as a Foreman on November 25, 2012. He testified that he was working with Mr. Swartz on November 14, 2012. He testified that on that day they were stacking wood for an elder gentleman that owned the property and Don went down to his knee and started complaining about his belly hurting. He testified that he reported the incident to his immediate supervisor, Kevin Cranberg, and that he told Don to "hang out, not to lift anything." On cross examination, it was established that Mr. Davis was a client of the petitioner's attorney's lawfirm, and that he had a pending workers' compensation case against Wright Tree Services. It was established that he was asked to testify in the matter the day before the hearing. On cross examination, he was asked why he did not come forward sooner, filing an Affidavit on Mr. Swartz's behalf if he had an injury and he testified that he assumed that the Company had a record of the injury. He was asked whether or not he had a copy of the accident report that he prepared and he did not. When asked on cross examination if Mr. Swartz on the date in question went for medical care, he indicated "no." When he was confronted with the records from Quincy Medical Center for services on November 14, 2012 regarding his visit after work for his fingers and hands, he then changed his testimony to indicate that the petitioner did get medical care but he did not go in with the petitioner. He was asked the address of the medical provider that he drove the petitioner to, and he was unable to give same. The Respondent called the petitioner's direct supervisor, Jason Bryant; who testified that the petitioner never reported the incident of "moving wood" indicating

that he thought the petitioner complained of his stomach pain after the ankle injury of November 15, 2012. He testified that the petitioner never told him the stomach pain was related to the ankle injury, but he recalled the petitioner complaining about his stomach at or about that time.

The petitioner was seen by Dr. Philpott on November 14, 2012. The petitioner did fill out a New Patient form on that date, indicating that the problems that brought him to see the doctor were a large ganglion on the right thumb, pain in both wrists and elbows, and some pain in both shoulders. Contrary to the petitioner's testimony, there was no mention of him sustaining an injury on that date to his stomach.

In reviewing the records from Dr. Philpott, the petitioner's complaints were of a very large ganglion cyst on the thumb and trigger fingers as well as pain in the wrists, elbows and shoulders. There was a prior history of a umbilical herniorrhaphy being performed by Dr. Todd Petty. There were no complaints by the petitioner of any stomach pain or findings of same. The petitioner was released to light duty.

The petitioner was seen at McDonough District Hospital Emergency Services on November 16, 2012. His complaints were to the right ankle. There were no complaints of stomach pain and no history of the alleged injury to his stomach (hernia) on November 14, 2012.

The petitioner saw Dr. Daniels on December 7, 2012. Dr. Daniels released him to return to work, full duty, for the ankle injury effective December 14, 2012. The doctor's records indicate that on his way out of the examining room, the petitioner asked about an area on his abdomen that was repaired by Dr. Petty. The records indicate that the examiner did not really see anything today, indicating that he was not sure if that issue is work related or not, but would refer him back to his surgeon who worked on that.

The petitioner on December 7, 2012, also saw Dr. Travis Moore. On that date, the petitioner gave a history of on November 14, 2012, reported pain above and into the right of his umbilicus. The indication was that the doctor did check for an indirect hernia as well as a direct on the right groin area and could not palpate anything but the petitioner should be evaluated by his surgeon to see if he had an indirect hernia. He indicated that pending the appointment with Dr. Petty, the petitioner was given work restrictions for lifting and climbing so that the hernias do not get any worse.

The petitioner testified that he was accommodated at work by his employer through December 12, 2012 which would be the date that he was released to full duty for the ankle injury.

The petitioner was seen by Dr. Petty on December 18, 2012. The petitioner gave a history of lifting a log at work when he noticed discomfort through the mid abdomen, also had discomfort that radiates into his groin, towards the scrotum, especially on the right side. Dr. Petty noted that he did do an umbilic hernia repair in 2009, with a 4 cm piece of composite mesh. The history was of gaining weight, says he gained at least 30 to 40 pounds in the last two years. The doctor felt that the petitioner had reducible tissue off towards the right, and he suspected he formed a new hernia lateral to the mesh.

The petitioner was examined by Dr. David Fletcher at the request of the Respondent on December 21, 2012. In his report, Dr. Fletcher disputed the causal connection between the petitioner's current hernia and the alleged work injury. At the time of Dr. Fletcher's deposition, he was asked the question "did you formulate an opinion based upon a reasonable degree of medical and surgical certainty as to whether or not that hernia was either caused or aggravated by his employment" and the doctor's opinion was there was no causal connection. He was asked the basis of that opinion and his testimony was "this was a pre-existing condition. He had surgical intervention, he gained weight, which is a risk factor. There was no description in any of the medical records or history given to the physician that it was related to his work activities." He indicated that it was "not uncommon, especially when a patient has a weight gain over time, and if they had a mesh put in, that sometime they can develop defects lateral to the sight of the mesh."

The petitioner on February 6, 2013, called Dr. Petty's office indicating that the work comp doctor said the reason he had hernias is because Dr. Petty did not fix it right the first time, with the patient saying work comp won't pay for the repair, asking Dr. Petty to pay for the repair. He was advised of the office note of December 18, 2012, trying to explain the patient's weight gain, continued heavy lifting, and with any hernia repairs, a chance of recurrence. The suggestion was for the patient to make an appointment to come in and discuss.

The petitioner did come to Dr. Petty on February 14, 2013. The doctor went over the proposed surgery to include a larger piece of mesh to cover this. The doctor indicated that nowhere in his prior notes did he specify etiology for his hernia. He indicated that he mentioned some weight gain. He indicated that he does a lot of heavy lifting at work. The doctor indicated that it is not under his expertise to attribute etiology, simply provide diagnosis and treatment.

On February 15, 2013, the petitioner called the doctor's office asking that the doctor change the history of weight gain, 30 to 40 pounds in the past two years. The petitioner alleged that he only gained 15 pounds.

The petitioner did undergo hernia repair, ventral with mesh, by Dr. Petty on February 25, 2013. That surgery was paid by Public Aid.

The petitioner returned to Dr. Petty on March 14, 2013. The petitioner was still tender, the incisions were well healed. The indication was that he would continue to improve with time. It was noted that he was not currently working and he needed to avoid any heavy lifting for another month, so he was given a slip for that.

The petitioner called Dr. Petty on March 26, 2013 to complain that the area around the belly button is numb.

The petitioner returned to Dr. Petty on May 30, 2013, still having some severe pain in the area where the stitches are when he bends over. The petitioner was not released to return to work at this time.

The petitioner was seen by Dr. Petty on June 13, 2013. He complained of pain with position changes or laying on his right side. Examination revealed completely non tender except the left mid abdominal tendon where the surgical scar was. There was no palpable hernia or palpable abnormalities. The doctor advised the petitioner that he was having pain from closing the muscle. He indicated that to make him more comfortable, he could give him a steroid Marcan injection. There was no release to return to work at this time.

When the petitioner testified on Arbitration, he testified that Dr. Petty has not released him to work. He testified that he wanted the injection.

The petitioner's account of the occurrence on November 14, 2012, was inconsistent with his witnesses' testimony as to what occurred on that date, with the petitioner testifying he told Dr. Philpott on November 14, 2012, of his stomach injury and of his witness initially testifying prior to being confronted with documentation that the petitioner did not get medical care on that date. The Arbitrator notes that the petitioner alleges that he told Dr. Philpott about the incident on November 14, 2012, with the questionnaire filled out by the petitioner being inconsistent with same, and with the records of Dr.

Philpott also being inconsistent with same. The Arbitrator would note that when the petitioner's witness testified as to the incident of November 14, 2012, the pain in the petitioner's stomach was so severe that he was crouched down to the ground, putting further in question in the Arbitrator's mind if the pain was "so severe" why didn't he mention it to Dr. Philpott on November 14, 2012, or to McDonough District Medical Center Emergency Center on November 16, 2012. The Arbitrator would note that the first mention of the alleged incident in question on November 14, 2012, was after he was walking out of Dr. Daniels' office on December 7, 2012, for his complaints to his fingers and thumbs, asking the doctor to look at the hernia.

WHETHER PETITIONER'S AND RESPONDENT'S EXHIBITS ARE ADMISSIBLE AS A MATTER OF LAW?

At trial, Respondent objected to Petitioner's exhibits numbered three through nine for several reasons. The main objection was that Section 16 of the Illinois Workers' Compensation Act, which was the vehicle for introduction of these exhibits, was unconstitutional as violating Respondent's due process rights.

However, the Commission has held on a number of occasions that it does not have authority to rule on constitutional issues. See *Jarabe v American Airlines*, 95 IIC 209; *Javier v. Robinson Bus Company*, 97 IIC 2267; *Starofsky v. Industrial Commission*, 01 IIC 895. The Arbitrator finds the reasoning in those cases persuasive and will not rule that the statute is unconstitutional. Respondent has preserved the issue by raising it and is free to argue it before the Courts which have the authority to rule on it.

Respondent next argued that the certifications contained with Petitioner's exhibits do not conform with the requirements of Section 16. The Arbitrator finds that the certifications contained with those exhibits are in line with Section 16. They are certified as representing true and correct copies, which is what the Act requires.

With respect to the medical bills, Respondent argued that they are inadmissible because they do not reflect charges under the fee schedule outlined in Section 8.2 of the Act. The fee schedule section states that the Respondent is not liable for charges which exceed those under the schedule. If liability is found, Respondent is

only responsible for the fee schedule charges. Nothing in Section 8.2 prevents admissibility of the bills submitted.

For these reasons, the Arbitrator admits Petitioner's Exhibits three through nine into evidence.

Finally, Petitioner objected to Respondent's Exhibits numbered four through eleven on the ground that they have not been properly certified. The Arbitrator admits them into evidence pursuant to the reasoning in the Fencil-Tufo case. *Fencil-Tufo Chevrolet v. Industrial Commission,* 169 Ill. App.3d 510, 523 N.E.2d 926 (1988). They represent treatment records not prepared for litigation purposes.

In light of the Arbitrator's findings on whether an accident occurred as alleged, the other issues become moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL DUCKETT,

Petitioner,

14IWCC0208

vs.

NO: 11 WC 41993

SAUK TRAIL TAXI,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of employer-employee relationship, medical expenses, average weekly wage, benefit rate, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

With regard to Petitioner's Motion to Strike Respondent's Reply Brief, the Commission denies said motion, finding there is nothing in the Act or Rules that allows for striking a brief.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 11, 2012 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Motion to Strike Respondent's Reply Brief is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

14IWCC0208

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 27 2014
KWL/kmt
O-02/11/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0208

DUCKETT, MICHAEL
Employee/Petitioner

Case# 11WC041993

SAUK TRAIL TAXI
Employer/Respondent

On 12/11/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0850 CIFELLI SCREMENTI & DORE
DAVID CIFELLI
423 ASHLAND AVE
CHICAGO HTS, IL 60411

0286 SMITH AMUNDSEN LLC
LES JOHNSON
150 N MICHIGAN AVE SUITE 3300
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0208

Case # 11 WC 41993

Consolidated cases: N/A

Michael Duckett
Employee/Petitioner

v.

Sauk Trail Taxi
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Chicago**, on **October 26, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **8(a) medical services requested, specifically pain management and physical therapy**

FINDINGS

On the date of accident, **October 19, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent as explained *infra*.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment as explained *infra*.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident as explained *infra*.

As causal connection has been resolved against Petitioner, no findings are made with regard to Petitioner's earnings or average weekly wage in the year preceding the injury as explained *infra*.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services as explained *infra*.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

As explained more fully in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner's claimed current condition of ill-being is not causally related to the accident sustained at work on October 19, 2011. By extension, all other issues are rendered moot, no further findings are made by the Arbitrator, and all requested compensation and benefits are denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

December 11, 2012
Date

DEC 11 2012

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*
19(b)

14IWCC0208

Michael Duckett
Employee/Petitioner

v.

Sauk Trail Taxi
Employer/Respondent

Case # 11 WC 41993

Consolidated cases: N/A

FINDINGS OF FACT

The issues in dispute include employer/employee relationship, accident, causal connection, Petitioner's wages, certain medical bills, a period of temporary total disability, and Petitioner's entitlement to prospective medical care. Arbitrator's Exhibit ("AX") 1. Michael Duckett ("Petitioner") testified at trial and no other witnesses were called by either party.

Petitioner testified that on October 19, 2011, he was driving a cab that broke down and he was then rear-ended by another car. Before this date of injury, Petitioner testified that he had not injured his back before. Petitioner did have a car accident two months prior, in August, for which he treated with Dr. McGarry. Petitioner testified that he saw him for a couple of weeks, got stitches to forehead and he recovered fully. Petitioner also testified that he has not had any other injury that would have aggravated his back between October 19, 2011 and the date of trial.

Medical Treatment

On October 21, 2011, Petitioner underwent cervical and lumbar spine x-rays. PX3(u-v). The interpreting radiologist noted mild degenerative changes to Petitioner's mid to lower cervical spine after a "[m]otor vehicle accident two months ago with upper back pain." *Id.* She further noted Petitioner's presentation with a "[h]istory of MVA with low back pain" and found mild levoscoliosis of the lumbar spine with facet arthritic changes at L4-S1 levels. *Id.*

On October 24, 2011, Petitioner saw James McGarry, M.D. ("Dr. McGarry") at WellGroup Health Partners ("Well Group"). PX3(f). Petitioner reported that he was out of pain medication and was in a lot of pain in the lumbosacral area because he had another motor vehicle accident. *Id.* Upon examination, Dr. McGarry noted inflammatory nodules along the lumbosacral area of the sacral iliac junction, bilateral right more than left, great discomfort and minimally precipitated pain with straight leg raises, and hip rotation more so abduction than adduction. *Id.* Dr. McGarry diagnosed Petitioner with low back pain with possibly underlying pathology. *Id.* He prescribed Ultram, Diclofenac, Myoflex cream and wet heat. *Id.*

On November 1, 2011, Petitioner saw William Payne, M.D. ("Dr. Payne") at WellGroup. PX3(g). Petitioner reported continued low back pain over the previous month after two motor vehicle accidents. *Id.* The record reflects Petitioner's report that "he was okay and was feeling pretty good after the first accident [in August 2011] and when the second accident [in October 2011] occurred." *Id.* Petitioner reported left pain in the buttocks down his left leg, numbness and tingling from his leg, and weakness in standing which is worsened all day when standing for extended periods of time. *Id.* Petitioner also reported pain with sneezing, coughing, and walking at

a level of 9/10. *Id.* Petitioner reported that the Tramadol and Voltaren and prescribed by Dr. McGarry were not working well for him.

Upon examination, Dr. Payne noted thyroid nodules in the neck, tenderness in the ribs on the right side, no CVA tenderness, "some lumbosacral tenderness with wincing to palpation[, and] left leg weakness in his EHL extensors, dorsiflexors." *Id.* Dr. Payne ordered a lumbar MRI and limited CT scan at L5 only to rule out pars defect, a cervical spine MRI, and physical therapy for his cervical and lumbar spine as well as weakness in the left leg. *Id.* Dr. Payne discontinued Petitioner's other pain medicines and prescribed Norco, Naproxen 500, and Lidoderm patches. *Id.*

On November 10, 2011, Petitioner underwent a lumbar spine MRI to evaluate for a pars fracture, which the interpreting radiologist noted showed no evidence of acute fracture or subluxation and was otherwise unremarkable limited CT of the lower lumbar spine. PX3(x-y). A cervical spine MRI of the same date revealed degenerative changes of the cervical spine most notably at C5-C6 and facet arthropathy causing mild bilateral neural foraminal narrowing. PX3(z-aa). A November 14, 2011 lumbar spine MRI revealed mild left paracentral disc protrusion at L5-S1 with no significant central canal stenosis or neural foraminal narrowing. PX3(bb-cc).

On November 29, 2011, Petitioner returned to Dr. Payne with complaints of severe back pain and lower back pain that was on and off. PX3(j-k). Petitioner also reported that he was unable to go to physical therapy due to his insurance and that he was out of pain medicine. *Id.* Petitioner's lumbar spine MRI showed an L5-S1 disc bulge and herniation and the cervical spine MRI showed a C5-6 disc herniation. *Id.* Dr. Payne diagnosed Petitioner with L5-S1 disc bulge and spondylolisthesis. *Id.* He also ordered an epidural injection and physical therapy, and for his cervical spine Dr. Payne ordered an epidural and physical therapy to see how Petitioner did.

On December 6, 2011, Dr. Payne restricted Petitioner from the following activities at work beginning December 12, 2011: climbing, working above ground level, working around high-speed or moving machinery, operating mobile equipment, lifting/pushing/pulling over 10 pounds, repetitive bending at the waist, kneeling, crawling, squatting, and driving work vehicles. PX3(m).

On February 7, 2012, Petitioner returned to Dr. Payne and reported that his lower back pain had been getting worse since his last visit and now traveled down his legs bilaterally. PX3(n-p). Petitioner also reported tingling in the low back, pain that woke him up at night, and he rated his pain level at this visit at 8/10. *Id.* Dr. Payne diagnosed Petitioner with cervicalgia and ordered an epidural steroid injection at C5-C6, physical therapy, Norco, Mobic and patches. *Id.* Dr. Payne also ordered a lumbar spine MRI in flexion and extension, an epidural injection and physical therapy. *Id.* He further noted that "[t]his is a work-related issue." *Id.*

On February 10, 2011 Petitioner underwent another lumbar spine MRI that revealed stable degenerative disc disease of the lumbar spine as compared to November 14, 2011. PX3(dd-ee).

On March 6, 2012, Petitioner reported continued severe low back pain that was causing him left leg pain and left buttock pain. PX3(q-r). Upon examination, Dr. Payne noted that Petitioner's EHL and tibialis anterior had weakness on the left as compared to the right. *Id.* Dr. Payne diagnosed Petitioner with herniated discs at C5-C6 and L5-S1. *Id.* He provided Petitioner with an AxiaLIF pamphlet on the lumbar spine, ordered an epidural for the cervical spine, and prescribed additional Mobic. *Id.*

On April 17, 2012, Petitioner reported pain in the lower left side of his neck which sometimes traveled down his left arm at a level of 7/10 that converged with his back pain at a level of 9/10 that traveled down the right hip and leg along with numbness and tingling. PX3(s-t). Dr. Payne's diagnoses remained the same. *Id.* He also refilled Petitioner's Norco, Mobic and Lidoderm patch prescriptions, ordered physical therapy and pain management, and referred Petitioner to Dr. Roland. *Id.*

Petitioner and Respondent's Relationship

Petitioner testified that he began working for Respondent on April 15, 2010. He signed a "membership agreement" on the same day and testified that he did not really read it before he signed it. Petitioner also testified that none of the conditions contained in the agreement were enforced.

The membership agreement states that Petitioner agreed to pay $85 monthly as membership dues payable on the first of every month. Petitioner's Exhibit ("PX") 1. Petitioner testified that he never paid this fee. The membership agreement further states that Sauk Trail Taxi Association and Petitioner "mutually agreed that the relationship between them shall be that of an independent contractor, and that nothing herein, should be construed to create the relationship of employee and employer, respectively. [Petitioner] shall be free to exercise, in his/her best judgment, the manner and method by which they operate their cab." PX1.

Sauk Trail Taxi Association also agreed to provide Petitioner with public liability insurance and noted that it would not provide workman's compensation insurance coverage. PX1. Petitioner testified that he did not maintain his own insurance. In addition, Petitioner "waiv[ed] all rights to make claims against [Sauk Trail Taxi Association] for any injuries sustained in the course of [Petitioner] conducting the business of driving a cab, or otherwise operating a taxicab business." PX1.

Petitioner testified that the only skills involved in his job were being able to drive a car and read a map. He did not own or lease the cab that he drove. He could not allow someone else to drive the cab given to him, sublease the cab, or provide a temporary driver. Petitioner testified that he had no financial interest in the cabs whatsoever.

Petitioner also testified that he had no right to control the manner in which he did his job and that Respondent had the absolute right to discharge him with or without cause. On cross examination, Petitioner testified that Respondent has fired other drivers in the past for customer complaints, not coming to work, or personal reasons. He further testified that Respondent would then try to hire someone else.

Petitioner went to work every morning at 5:00 a.m. and testified that he had no right to control his shift from 5:00 a.m. to 5:00 p.m. six days per week; Petitioner testified that he could be fired by Respondent for doing so. *See also* PX1. Petitioner testified that Respondent would call him on the radio and he would pick up passengers where he was told to go by the dispatcher. Petitioner testified that his job was controlled by radio calls and that he was not allowed to pick up fares on his own. Petitioner would call Respondent to get permission before picking up a potential passenger that needed a fare, Respondent set the fee for rides by zone and Petitioner's cab did not have a meter. On cross examination Petitioner testified that he did not have any arrangements with any customers for repeat business; that Respondent arranged for that and would generally assign the closest cab driver to the customer. Petitioner testified that Respondent had only 2-4 cab drivers.

Petitioner also testified did not maintain the cab other than putting fuel in it for which he paid and that he would buy from the cheapest station and that Respondent did not have fuel pumps. Respondent has more than one cab

and they all look alike with Respondent's name on side and its phone number. Petitioner did not have the right to a cab in the morning when he arrived at work and he testified that he was refused a cab on occasion when one was inoperable. On cross examination, Petitioner testified that he was not guaranteed a certain vehicle and that he would get whichever one they had; on the days that he was late he did get a cab, but there was more than one occasion when his cab broke down and he would not drive or get paid on those days.

Petitioner testified that he was not responsible for any repair work and that Respondent would fix the cabs and that the owner's son would fix the cabs if they needed repairs. Respondent was responsible to get inoperable vehicles off the road and tow them if necessary. Petitioner could not make any repairs to the cab without prior approval and he testified that the cabs were always kept at Respondent's property; he could not take one home.

Regarding his wages, Petitioner testified that he was paid weekly, in cash, for half of the fares that he collected each day minus the cost of fuel. Petitioner received weekly slips that reflect that he earned. *See* PX2. Petitioner testified that he is missing approximately nine of these slips or so. On cross examination, Petitioner testified that Respondent's owner, Teresa, would write at the bottom of the weekly reconciliations and note the amount earned each week. *See* PX2. The Arbitrator notes that none of the slips submitted in Petitioner's Exhibit 2 reflect the year for each week's wages. Petitioner further testified that no taxes or FICA was withheld from these earnings; he would receive a "1099." The Arbitrator notes that no 1099 forms were submitted into evidence.

On cross examination Petitioner also testified that he would return to work for Respondent after he recovered from briefly being sick, which only happened 1-2 times. He further testified that if he had a personal matter to which to attend, he would tell the owner beforehand and he would get someone to cover and take his shift. The Arbitrator notes that Petitioner's Exhibit 2 reflects that Petitioner was absent more than 1-2 times over the approximately 15 months of weekly slips that were submitted into evidence, but that the year for these absences cannot be determined from the slips.

Additional Information

Regarding his current condition, Petitioner testified that his back, neck and lower back are killing him. He also testified that he has not looked for other work because he has not yet been released to work.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above, and the Arbitrator's and parties' exhibits (AX1, PX1-PX4) are hereby made a part of the Commission file. After hearing the parties' testimony, reviewing the evidence, and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (A) and (B), whether Respondent was operating under and subject to the Illinois Workers' Compensation Act ("Act") and whether there an employee-employer relationship, the Arbitrator finds the following:

The Arbitrator finds that an employer-employee relationship existed on Petitioner's claimed date of accident. In so finding, the Arbitrator notes that the parties do not dispute whether Respondent was an employer under the Illinois Workers' Compensation Act ("Act"). Petitioner argues that Respondent was an employer under the Act by citing "evidence" not submitted at trial. Respondent, however, does not argue that Respondent is not an employer subject to the Act; rather, it argues that no employer-employee relationship existed at the time of Petitioner's claimed injury at work. As such, the Arbitrator finds that Respondent has waived any such argument and infers that Respondent had evidence within its control establishing that it was an employer under the Act. Thus, the Arbitrator finds that Respondent was an employer as defined by the Act.

Next, the Arbitrator finds that Petitioner was Respondent's employee pursuant to the Act and notes that Petitioner's testimony on this issue is uncontroverted. "There is no rigid rule of law for determining whether an employer-employee relationship exists, rather such a determination depends upon the particular facts of the case." *West Cab Co. v. Industrial Comm.*, 376 Ill.App.3d 396, 404, 876 N.E.2d 53 (1st Dist. 2007). Various factors must be considered including "the right to control the manner in which the work is done, the method of payment, the right of discharge, the skill required in the work to be done, and who provides tools, materials, or equipment." *West Cab*, 376 Ill.App.3d at 404 (*citation omitted*). The court expounded that "the right to control the manner in which the work is done is the paramount factor in determining the relationship." *Id.* Moreover, in taxicab cases, the Court noted that "particular weight should be given to the following factors in determining the issue of control of the manner in which the work is done: 1) whether the driver accepted radio calls from the company; 2) whether the driver had his radio and cab repaired by the company; 3) whether the vehicles were painted alike with the name of the company and its phone number on the vehicle; 4) whether the company could refuse the driver a cab; 5) whether the company has control over work shifts and assignments; 6) whether the company requires that gasoline be purchased from the company; 7) whether repair and tow service is supplied by the company; 8) whether the company has the right to discharge the driver or cancel the lease without cause; and 9) whether the lease contains a prohibition against subleasing the taxicab." *West Cab*, 376 Ill.App.3d at 405 (*citation omitted*).

In this case, Petitioner testified that there was little skill involved in his position, other than knowing how to drive a car and read a map, and that he did not own or lease the cab that he drove for Respondent. Petitioner did not pay for his own insurance while driving for Respondent. Petitioner took all of his assignments from Respondent through dispatch, unless a potential passenger's fare was set by Respondent after Petitioner's request for permission and the appropriate fare rate. Respondent also set the fares for all of Petitioner's cab passengers. Respondent performed all repairs and towing necessary for inoperable or damaged cabs. Respondent's cabs all looked alike and had Respondent's name and phone number. Respondent could refuse to provide Petitioner with a cab and had done so on some occasions. Respondent arranged for Petitioner's 12-hour shift from 5:00 a.m. to 5:00 p.m. and could terminate Petitioner for failing to work these hours. Respondent

could also terminate Petitioner's employment at will and had done so with other cab drivers in the past. Petitioner also purchased all of the fuel for the cab, which was deducted from Petitioner's half of the fares and paid to him by Respondent in cash.

In addition, Petitioner had no ownership interest in any cab that he drove for Respondent. While Respondent provided a copy of its "membership agreement" with Petitioner, this is not dispositive on the issue of employer-employee relationship, particularly in light of the record as a whole. *See Wenholdt v. Industrial Comm.*, 95 Ill. 2d 76, 80, 447 N.E.2d 404 (1983). There is no evidence that Petitioner paid the monthly $85 fee as required under the contract and no evidence was submitted to establish that Petitioner had any financial interest in any vehicle, permit or medallion for any cab driven for Respondent.

Based upon all of the foregoing, the Arbitrator finds that an employer-employee relationship existed on Petitioner's claimed date of accident.

In support of the Arbitrator's decision relating to Issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

The Arbitrator finds that an accident occurred that arose out of and in the course of Petitioner's employment with Respondent. In so finding, the Arbitrator notes that Respondent did not put forth any argument on the issue of accident other than asserting that the issue was moot because no employer-employee relationship existed. As explained above, that issue has been resolved in Petitioner's favor. Notwithstanding, the Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of his employment as claimed.

Petitioner testified that he was rear-ended by another car while waiting in Respondent's inoperable cab for Respondent to come and tow the cab. Petitioner's testimony is corroborated by his reports in contemporaneous medical records. The Arbitrator notes that some of Petitioner's treating medical records reflect that he reported the accident as occurring on October 20, 2011, however, this discrepancy is minor given that Respondent does not dispute notice of Petitioner's claimed accident and that additional medical records reflect an October 19, 2011 accident date which is consistent with Petitioner's testimony at trial. Based on all of the foregoing, the Arbitrator finds that Petitioner's claimed injury arose out of and was sustained in the course of his employment with Respondent.

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's claimed current condition of ill-being is not causally related to the injury that he sustained at work on October 19, 2011. In so finding, the Arbitrator again notes that Respondent did not make any arguments regarding the issue of causal connection and, instead, relied solely on its assertion that no employer-employee relationship existed rendering all other issues moot. Notwithstanding, the Arbitrator finds that Petitioner's testimony at trial on this issue was not credible, is contradicted by the medical records, and the sequence of events as reported by Petitioner is inconsistent with other record evidence.

Petitioner testified that he had not injured his back before his claimed injury on October 19, 2011. However, the very first medical record submitted into evidence reflects that Petitioner underwent a cervical spine MRI on October 21, 2011 at which time Petitioner reported a "[m]otor vehicle accident two months ago with upper back pain." PX3(u-v). This latter-referenced accident corresponds with Petitioner's report at trial of an August of 2011 accident which Petitioner testified only required a few stitches and from which he fully recovered before

his October 19, 2011 accident. Thereafter, on November 1, 2011, Petitioner reported continued low back pain over the previous month after both motor vehicle accidents. PX3(g). These contemporaneous medical records contradict Petitioner's testimony at trial about the claimed sequence of events and that he was completely asymptomatic with regard to his back at the time of the second accident on October 19, 2011 after the purportedly minor accident two months prior which required only a few stiches.

In addition, while the Arbitrator notes that the only causal connection opinion presented at trial is from Dr. Payne, Petitioner's treating physician, none of the medical records from the accident in August of 2011 were submitted at trial to substantiate Petitioner's testimony at trial that he was asymptomatic in the back prior to his accident on October 19, 2011. The burden is on Petitioner to prove the compensability of his claim by a preponderance of credible evidence and, while an independent medical evaluation or Section 12 examination report from Respondent may have clarified certain matters in this case, Petitioner has failed to meet his burden. *See Caterpillar Tractor Co. v. Industrial Comm.*, 83 Ill. 2d 213, 216-17, 414 N.E. 2d 740 (1980) (claimant must prove by a preponderance of competent evidence each essential element of his claim and even undisputed evidence that would sustain a finding for the claimant may be insufficient in consideration of the record as a whole) (*citations omitted*).

Based on all of the foregoing, the Arbitrator finds that Petitioner's claimed current condition of ill-being is not causally related to the accident sustained at work on October 19, 2011. By extension, all other issues are rendered moot, no further findings are made by the Arbitrator, and all requested compensation and benefits are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF HENRY)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Roy Kimble,
Petitioner,
vs.

14IWCC0209

NO: 11 WC 14369

Poly One Corp.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, medical expenses permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 17, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 7 2014
KWL/vf
O-3/25/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0209

KIMBLE, ROY A
Employee/Petitioner

Case# **11WC014369**

POLY ONE CORP
Employer/Respondent

On 5/17/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1337 KNELL & KELLY LLC
STEPHEN P KELLY ESQ
504 FAYETTE ST
PEORIA, IL 61603

4866 KNELL & O'CONNOR PC
ROBERT M HARRIS
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

STATE OF ILLINOIS)
)SS.
COUNTY OF HENRY)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# ARBITRATION DECISION
19(b)

14IWCC0209

ROY A. KIMBLE,
Employee/Petitioner

v.

POLY ONE CORP.,
Employer/Respondent

Case # 11 WC 14369

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Kewanee**, on **December 10, 2012.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other: _____

14IWCC0209

FINDINGS

On the date of accident, **August 27, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this alleged accident *was* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the alleged accident.

In the year preceding the alleged injury, Petitioner earned **$58,760.00**; the average weekly wage was **$1,130.00**.

On the date of alleged accident, Petitioner was **60** years of age, ***single*** with **no** dependent children.

Petitioner ***has in part*** received all reasonable and necessary medical services.

Respondent ***has in part*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$ 0.00** for TTD, **$ 0.00** for TPD, **$ 0.00** for maintenance, and **$ 0.00** for other benefits, for a total credit of **$ 0.00**.

Respondent is entitled to a credit of **$ 0.00** under Section 8(j) of the Act for medical benefits.

ORDER

Petitioner failed to prove that he sustained accidental injuries that arose out of and in the course of his employment by Respondent on August 27, 2009.

Petitioner further failed to prove that the current condition of ill-being is causally related to any employment on behalf of this Respondent.

All claims for compensation in this matter are thus hereby denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator JOANN M. FRATIANNI

May 10, 2013
Date

ICArbDec19(b)

MAY 17 2013

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

F. Is the Petitioner's present condition of ill-being causally related to the injury?

Petitioner works for Respondent as a boiler operator. He began working for them 45 years ago and for the last 26 years has worked as a senior boiler operator. As an "inside" and "outside" boiler operator, he was require to work with an auger, remove ash using a dustpan and dump it into a bucket, run and use a hose to clean out boilers, use metal piping to chip away ice on cooling towers during winter, crank curtains, use a coal auger, dump coal into buckets using a shovel, turn various valves, carry and climb ladders up and down as many as seven flights of stairs, lift bags of wet coal, pull chains, use certain impact vibrating tools, use an end loader and forklift, use cranks, eyedroppers, beakers and tubes in a lab, and use computers and a mouse daily to monitor boiler activity. These tasks would vary from day to day and from job to job based upon his assignments. Petitioner would constantly use both hands in performing such work.

Petitioner testified the "outside" boiler work was more physical and outside and inside work would rotate every other day. The "inside" work is less physical and involves computers, inspections, readings and taking of samples.

Petitioner testified he worked a rotating shift. He would work 12 hour days and some 400 hours of overtime annually. The shifts were designed to allow time off of work for several days. Petitioner at times could have up to six days off in a schedule.

Respondent produced videotape that it claims depicts Petitioner's job duties. Petitioner testified the videotape does not depict all of the work activities he performed as a boiler operator.

Mr. George Lester, Jr. was called to testify by Respondent. Mr. Lester testified he is Petitioner's supervisor and Respondent's B-shift supervisor. Mr. Lester testified that during the 12 hour workday, boiler operators work two hours and then take a half hour break, unless there is a problem. Petitioner was assigned a work schedule of four midnight shifts, three days off, then three day shifts and one day off, then three midnight shifts and three days off, and then four day shifts, and seven days off.

Mr. Lester further testified an "inside" boiler operator monitors boilers and answers alarms. The "outside" operators take care of auxiliary equipment. The outside job is more strenuous and requires more manual labor. Workers are outside one day and inside the next. Mr. Lester testified that 60% of a boiler operator's time is spent inside working on the computer, with lab work taking maybe two hours of a shift. Boiler operators would turn valves when boilers are down, and that occurs 3-4 times a year. Mr. Lester testified that he was not aware of a jackhammer ever being used during his time as a supervisor.

Mr. Jim Dewalt was called to testify by Respondent. Mr. Dewalt testified he is a process engineer and has worked for Respondent for 40 years. Mr. Dewalt testified he worked with Petitioner in the boiler house from 2001-2010 and in other areas of the plant. Mr. Dewalt testified he is familiar with the type of work performed by a boiler operator and the shift schedules. Mr. Dewalt confirmed the differences between working inside and outside as a boiler operator. Mr. Dewalt testified an outside boiler operator would use air impact tools 6-8 times a year. Mr. Dewalt only saw jackhammers when they were used by outside contractors in 2008-2009.

Mr. Dewalt viewed a written job description (Rx10) and agreed with the contents. Mr. Dewalt testified the written job description did not contain every conceivable task a boiler operator performs.

Mr. Rod LeQuia was called to testify by Respondent. Mr. LeQuia testified he is Petitioner's co-worker and a fellow boiler operator and they worked together since 2006. Mr. LeQuia testified that an inside boiler operator spends most of his time monitoring with a computer, or 10 hours or 85% of the time while inside. Inside and outside work is split every other day. Outside work is typically harder. Mr. LeQuia testified the frequency of various jobs he performs as a boiler operator varies.

Petitioner testified that during the six months prior to August of 2009, he began to experience symptoms with his right and left wrists and hands that included pain and stiffness, which gradually worsened. Petitioner first sought treatment on August 20, 2009 with a visit to the company nurse and Dr. Faber, the company physician.

Dr. Faber testified by evidence deposition. (Px10) Dr. Faber testified that he is general practitioner with no particular specialty. He saw Petitioner on August 20, 2009 and recorded a history that his symptoms were getting worse. When seen on January 31, 2011, Petitioner told him his symptoms "started several months ago", which would indicate sometime in the year 2010. Petitioner during his testimony agreed with the history so recorded by Dr. Faber on that date.

Dr. Faber testified that he eventually referred Petitioner to see Dr. James Williams, an orthopedic surgeon. Dr. Faber testified that he had no specific knowledge of Petitioner's job duties and was unable to describe the work he performed. Dr. Faber testified that he did not know what type of impact and vibrating tools Petitioner may have used, if any, and how frequently he used them. Dr. Faber testified he never reviewed Petitioner's job description or reviewed Petitioner's job duties with him.

Petitioner saw Dr. James Williams on May 12, 2012. Dr. Williams testified by evidence deposition (Px9) that he is a board certified orthopedic surgeon. Dr. Williams recorded a history of injury. This included a job description. Dr. Williams testified that Petitioner informed him that as a boiler operator, his job involved turning wrenches, using impact tools and using jackhammers. Dr. Williams testified that Petitioner's job consisted of repetitive forceful gripping and turning of valves as well as using jackhammers and wrenches and that this job would be an aggravating or contributing factor to what he diagnosed. Dr. Williams diagnosed recurrent bilateral carpal tunnel syndrome and new onset of bilateral cubital tunnel syndrome.

Dr. Williams' testimony as to the work performed by Petitioner was clearly contradicted by the testimony of Mr. Lester, Mr. Dewalt and Mr. LeQuia. In addition, Dr. Williams testified that he never viewed a written job description or video of the work performed.

Petitioner saw Dr. Michael Vender, an orthopedic surgeon, on February 24, 2012. This examination occurred at the request of Respondent. Dr. Vender reviewed certain medical records, a written job description and the video of the work prepared by Respondent and ultimately authored three reports. Dr. Vender concluded that both the written job description and video depiction revealed a significant time walking and observing, and only intermittent utilization of the hands and upper extremities. Dr. Vender felt there was no repetitive use of the upper extremities nor significant exposure to forceful activities to the elbows, wrists or hands. Dr. Vender concluded that the activities depicted in the video and written job description would not be considered contributory to ulnar neuropathy of the elbows or carpal tunnel syndrome.

Petitioner then sought treatment with Dr. James Williams, an orthopedic surgeon, on May 12, 2012. Dr. Williams has prescribed bilateral carpal tunnel and cubital tunnel surgical releases.

Petitioner previously suffered bilateral carpal tunnel syndrome injuries some 30 years ago that were surgically corrected. Petitioner testified that following the surgeries, he experienced no symptoms to his hands until 2009.

Based upon the above, the Arbitrator finds that Petitioner failed to prove he sustained accidental injuries that arose out of and in the course of his employment with Respondent on August 27, 2009, either through a single specific incident or through repetitive use of his hands and arms. The Arbitrator further finds that Petitioner failed to prove that a condition of ill-being manifested itself on August 27, 2009. Petitioner during his testimony has admitted nothing particular occurred on that day. In addition, Petitioner has failed to prove that his activities were such as to cause repetitive trauma to both hands and arms. The Arbitrator remains unsure of which activities were claimed to be repetitive and for what duration by Petitioner in this case.

Based further upon the above, the Arbitrator further finds the conditions of ill-being as diagnosed are not causally related to any work activities performed on behalf of Respondent.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, all claims for medical expenses and bills made by Petitioner in this matter are hereby denied.

K. Is Petitioner entitled to any prospective medical care?

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, all claims made for prospective medical care and treatment of the diagnosed conditions in this matter are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EILEEN FARINA,

Petitioner,

14IWCC0210

vs.

NO: 11 WC 01858

STATE FARM MUTUAL INSURANCE CO.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the both parties herein and notice given to all parties, the Commission, after considering the issues of accident, notice, medical expenses and PPD and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the Decision of the Arbitrator only to the extent that it finds it more appropriate to award permanent disability benefits under Section 8(d)2 of the Act rather than Section 8(e) of the Act. Though the evidentiary record indicates Petitioner did complain of pain to her right biceps, the Commission finds that Petitioner's complaints and subsequent treatment for the same are more accurately recorded as involving her right shoulder. Accordingly, the Commission finds Petitioner entitled to permanent partial disability benefits representing the 12.65% loss of use of the person as a whole.

All other findings and orders contained in the July 22, 2013, 19(b) Arbitration Decision are affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $380.77 per week for a period of 63.25 weeks, as provided in §8(b)2 of the Act, for the reason that the injuries sustained caused the 12.65% loss of use of the person as a

14IWCC0210

whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $36,200.00 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $26,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:
KWL: mav MAR 27 2014
O: 1/27/14
42

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0210

FARINA, EILEEN
Employee/Petitioner

Case# 11WC001858

STATE FARM MUTUAL INS CO
Employer/Respondent

On 7/22/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0564 WILLIAMS & SWEE LTD
JEAN A SWEE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

2904 HENNESSY & ROACH PC
STEPHEN KLYCZEK
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC0210

Eileen Farina
Employee/Petitioner

v.

State Farm Mutual Ins. Co.
Employer/Respondent

Case # 11 WC 01858

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen Mathis**, Arbitrator of the Commission, in the city of **Bloomington**, on **5-16-13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **7-1-10**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**33,000.24**; the average weekly wage was $**634.62**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent is entitled to a credit of $**38,958.60** under Section 8(j) of the Act.

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $1824.29 to OSF Medical Group and $34,254.90 to Orthopedic and Sports Medicine, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $38,958.60 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent is ordered to reimburse Petitioner in the amount of $5,470.58, for amounts paid out of pocket.

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of $380.77/week for 63.25 weeks, because the injuries sustained caused the 25% loss of the right arm, as provided in Section 8(e) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

7-15-13
Date

JUL 22 2013

C. DID AN ACCIDENTAL INJURY OCCUR THAT AROSE OUT AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

Petitioner testified that she had been employed by Respondent, State Farm Mutual Auto Insurance Company, since March of 2009. Petitioner testified that her job title was as a claims processor.

Petitioner testified that on and before 7-1-10, she spent 7.75 hours a day using the keyboard on her computer at work and that she used the mouse with her right dominant hand most of the work day.

Petitioner testified that on and before 7-1-10, she worked in a cubicle and that her computer was located in the corner where two desks met at a right angle. Petitioner said that her keyboard rested on a "surf" board which was placed diagonally at the corner of the two desks. Petitioner said that on and before 7-1-10, her keyboard was placed level with her standard-sized desk and that she did not use the pull out tray which would have lowered the keyboard. Petitioner said that her work chair was adjustable and that she had lowered her chair. Petitioner said she lowered her chair so she could keep her arms out straight in front of her to avoid resting her wrists. Petitioner said that she thought this would prevent her from developing carpal tunnel.

Petitioner testified that with her chair lowered, she could view the computer screen and she could keep her hands directly in front of her. Petitioner said that on and before 7-1-10, she used her mouse with her right hand. Petitioner said that she had to fully extend her arm away from her body to use the mouse. Petitioner said that when she used the mouse, she did not rest her wrist. Petitioner said that when she used the mouse she would reach in front of her with her arm at approximately chest level close to a 90 degree angle.

Petitioner testified that on approximately July 1, 2010, she began to notice pain in her right biceps when she was reaching and using her mouse. In the weeks following July 1, 2010, she noticed that her right shoulder pain increased after a week of work and that it became better after a weekend off.

Petitioner testified that within two weeks after 7-1-10, when she noticed the relationship between the pain in her right shoulder and the use of her mouse and computer, she decided to change her work site. Petitioner said that she asked Respondent's maintenance department to pull out the tray so that she could place her keyboard lower and closer to her body. Petitioner testified that she moved the computer and mouse closer to her body.

Petitioner testified that the change that she made in her work site did not improve her right shoulder pain. Petitioner said that she then requested an ergonomic assessment from Respondent on 8-30-10 which was performed on 8-31-10.

Respondent's witness, Misty Albert, testified that she was a loss prevention technician for Respondent. Ms. Albert testified that she was a high school graduate and that all of her training in loss prevention was through Respondent.

Ms. Albert testified that on 8-31-10 Petitioner's work site was at a medium risk for injury. Ms. Albert testified that Petitioner's tray for her keyboard was lower than her desk by approximately 4 inches and that her mouse was located on the tray. Ms. Albert testified that she removed Petitioner's wrist rest. Ms. Albert testified that she moved Petitioner's keyboard closer to Petitioner, that she recommended that Petitioner avoid an extended reach, that she use her left hand for mousing to avoid injury, and that she take regular breaks from computer work. Ms. Albert's testimony is supported by the ergonomic assessment detail (PX 4).

The Arbitrator finds that Petitioner's work both before and after she changed her work site in mid July 2010 placed her at greater risk than the general public. The Arbitrator therefore finds "accident."

E. WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT?

Petitioner testified that she began noticing right arm and shoulder pain while she was keyboarding and mousing on approximately 7-1-10.

Petitioner testified that within a few weeks after this date, she asked Respondent's maintenance department to unlock the tray to her keyboard so that she could lower the keyboard. Petitioner said that she told her team manager, Jay Sparks, that she was lowering the keyboard and changing her work site to accommodate her injury.

Petitioner testified that Respondent initially treated her injury as work related and that it stopped paying medical after Dr. Li suggested surgery in November, 2010.

The Arbitrator notes that the purpose of the notice requirement of the Act is to enable an employer to investigate an alleged accident, *Seiber v Industrial Commission*, 82 Ill.2d 87 (1980). A claim is barred only if no notice whatsoever has been given, *Silica Sand Transport Inc. v Industrial Commission*, 197 Ill.App.3d 640. Because the legislature has mandated a liberal construction on the issue of notice, if some notice has been given, although inaccurate or defective, then the employer must show that he has been unduly prejudiced, *Ganno Electric Contracting v Industrial Commission*, 260 Ill.App.3d 92.

In this case, Petitioner gave Respondent some notice within 45 days, although it may have been imperfect/constructive notice.

Respondent did not introduce any evidence that it may have been prejudiced by any imperfect notice.

The Arbitrator therefore finds that Petitioner gave notice within the 45 days allowed by the Workers' Compensation Act.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

Petitioner treated with her family doctor, Dr. Sheppard, on 9-30-10. Dr. Sheppard took a history that Petitioner had right shoulder and deltoid pain for several months and that it had been worse for the last two months. Dr. Sheppard's record states that Petitioner related her pain to working on the computer. Dr. Sheppard diagnosed Petitioner with right shoulder pain and right elbow pain and ordered an EMG (PX 2, PX 10).

Petitioner underwent an EMG with Dr. Jhee on 10-19-10 which was read as normal without definite electrodiagnostic findings of right carpal tunnel syndrome. Dr. Jhee noted that Petitioner had significant symptoms and signs of right shoulder tendinitis (contained in PX 11).

Dr. Sheppard referred Petitioner to Dr. Li, an orthopedic surgeon, on 11-1-10. Dr. Li's record states that Petitioner had a four month history of right shoulder pain which she believed was related to using her right upper extremity at work on a computer (PX 11). Dr. Li ordered an MRI of Petitioner's right shoulder on 11-1-10 which showed diffuse rotator cuff tendinosis with moderate peritendinobursitis and a thin partial thickness

undersurface tear of the subscapularis measuring 2.3 cm in medial to lateral dimension, glenohumeral and AC joint arthrosis, moderate joint effusion, and biceps tendinosis and tenosynovitis (PX 5).

Dr. Li performed surgery on Petitioner on 11-30-10 consisting of a right shoulder arthroscopy with rotator cuff repair, arthroscopic subacromial decompression, biceps tenotomy and debridement of Type I anterior-superior labral tear. Dr. Li's post-operative diagnosis was right shoulder rotator cuff tear, impingement syndrome, biceps tendon tear, and anterior and superior Type I labral tear (PX 6).

Petitioner testified that after surgery, she noticed pain during physical therapy. Dr. Li's 1-11-11 record states that Petitioner had a significant amount of tenderness over the distal third of her clavicle, that she had restricted range of motion, and adhesive capsulitis. Dr. Li took an x-ray on 1-11-11 which showed some bony periosteal reaction in the same area of impingement which he removed some undersurface of the clavicle during surgery. On 2-9-11 Dr. Li took another x-ray which showed significant periosteal healing (PX 11). Dr. Li testified by deposition on 11-12-12 that Petitioner may have sustained a hairline fracture of her clavicle from the surgery (PX 1, p. 9).

Dr. Li ordered an MRI on 6-23-11 which showed no evidence of rotator cuff re-tear, supraspinatus tendinosis without focal macrotear, status post biceps tenotomy with no evidence of biceps tendon re-tear, capsulosynovitis with small joint effusion and no evidence of loose body, marked AC joint arthrosis and capsular sprain with widening of the joint space consistent with AC ligament sprain representing either an overuse syndrome or post traumatic injury, and subdeltoid-subacromial bursal inflammation without evidence of rotator cuff re-tear (PX 8).

Dr. Li's record of 6-27-11 states that Petitioner has an inflammation of the AC joint which is corroborated by her symptoms and the MRI. Dr. Li's record states that Petitioner has an option of either tolerating the discomfort or undergo surgery (PX 11).

Petitioner testified at arbitration that initially after speaking to Dr. Li on 6-27-11, she did not want to undergo another surgery and that she tried to live with her shoulder pain. Petitioner said that when the condition did not improve, she made an appointment with Dr. Nicholson at Rush for a second opinion.

On 10-28-11, Dr. Nicholson took an x-ray of Petitioner's shoulder and stated that she had recurrent subacromial bursitis and that there may be some scarring. Dr. Nicholson stated that Petitioner had a sloped AC joint and it was degenerative. Dr. Nicholson recommended surgery (PX 12).

Petitioner underwent surgery with Dr. Nicholson on 2-22-12 consisting of a right shoulder arthroscopy with extensive debridement and revision of subacromial decompression including extensive adhesiolysis and revision subacromioplasty as well as a revision arthroscopic distal clavicle resection. Dr. Nicholson's post-operative diagnosis was right recurrent subacromial impingement syndrome, status post acromioplasty and arthroscopic rotator cuff repair and recurrent acromioclavicular joint arthralgia, status post-arthroscopic AC joint resection (PX 9).

Respondent's Section 12 doctor, Dr. Herrin, evaluated Petitioner at Respondent's request on 4-21-11. Dr. Herrin testified by deposition taken 11-15-12, that he took a history from Petitioner that while she was doing her work, her right arm was essentially in a forward flexed and slightly abducted position. Dr. Herrin opined that, based on the history that Petitioner provided, it was his opinion that Petitioner's work activities contributed to her shoulder symptoms or problems related to her rotator cuff (RX 1, p.p. 10, 11). Dr. Herrin stated that when he wrote his initial report giving a causal relationship, it was his understanding that Petitioner's wrists were not supported while she used the computer (RX 1, p.p. 11, 12). Dr. Herrin clarified that, initially, he did not think that Petitioner's work activity caused the rotator cuff tear, but that it aggravated it or irritated it (RX 1,

p.p. 12, 13). Dr. Herrin opined that the position that Petitioner held her arms would make the symptoms worse but would not cause the tear (RX 1, p. 14).

Dr. Herrin testified that Respondent asked him to do an addendum report based on an ergonomic assessment which Respondent provided to him. Dr. Herrin testified that after he reviewed the ergonomic assessment, it was his opinion that if Petitioner was resting her wrists to do her work activities, then there would be no stress on her shoulder or rotator cuff and he would therefore think that the work did not contribute to her right shoulder problem. Dr. Herrin stated, "my opinion really boils down to the fact that if she was resting her arms and wrists and doing her work activities, that should not stress the rotator cuff. If she was reaching away repetitively for prolonged periods of time, I think that could irritate the rotator cuff. I don't think it would cause a tear," (RX 1, p. 16). On cross examination, Dr. Herrin stated that he had not been provided an operative report (RX 1, p.p. 24, 25). On cross, Dr. Herrin testified that he re-drafted a report after reading Respondent's counsel's letter which included the ergonomic assessment of 8-30-10 (RX 1, p.p. 25, 26).

Dr. Li testified by deposition dated 11-12-12. Dr. Li testified that he was board certified in orthopedic surgery and had been practicing in the field since 1991 (PX 1, p.p. 4, 5).

Dr. Li testified that he reviewed Dr. Nicholson's operative report and opined that the surgical findings, including the removal of the scar tissue and decompression of the AC joint, was related to the 11-30-11 surgery (PX 1, p. 12). Dr. Li reviewed the ergonomics study of 8-30-10 and stated that the recommendation that Respondent pull Petitioner's keyboard closer to the edge of the work surface to eliminate any extended reach, and to use both hands with the mouse, were consistent with his understanding of Petitioner's work activities. Dr. Li stated that Petitioner had made complaints to him that her right shoulder pain developed with her extended reach and working with her hands away from her body to grab things (PX 1, p. 13).

Dr. Li opined that based on his history and the ergonomics study, Petitioner's work with Respondent contributed to the development of her right shoulder rotator cuff tear, biceps tendonitis, and impingement syndrome. Dr. Li stated that the work contributed to the symptoms, as well as further aggravated whatever her underlying problem was. Dr. Li stated that if Petitioner extended her arm away from her body to work, this would be a contributing factor to her right shoulder symptoms. Dr. Li opined that any reaching Petitioner did above the horizontal line and far out from the body could aggravate the symptoms and underlying condition (PX 1, p. 15). Dr. Li opined that Petitioner's second surgery with Dr. Nicholson was necessitated because of the first surgery and therefore related to her work (PX 1, p. 15). Dr. Li stated that Petitioner's use of her keyboard when it was set higher could have also contributed to her symptomatology requiring care (PX 1, p. 17).

On cross examination, Dr. Li stated that if a person rests his/her hands, it is less stressful on the arms when the arms are outstretched. On cross, Dr. Li stated that if a person extended their arms in front of their body without active reaching, it could make the symptoms worse but not make the tear worse. Dr. Li said that active reaching beyond the normal extension of the arm can cause a tear (PX 1, p. 19). On cross, Dr. Li stated that swinging a golf club and shoveling could cause a rotator cuff tear. Dr. Li stated that he did not think that sewing would cause a rotator cuff problem (PX 1, p.p. 22, 23).

Petitioner testified that prior to working for Respondent in March of 2009, she did not have any right shoulder pain or symptoms. This is consistent with Dr. Sheppard's records which date back to January of 2006 (PX 10). Petitioner said that she experienced right shoulder and biceps pain while extending her right arm reaching for her mouse on and prior to 7-1-10.

Petitioner testified on cross examination that during the summer months, she would golf at a nine hole golf course approximately 2 to 3 times a month with her husband and that she participated in gardening at her home.

Petitioner testified at arbitration that she provided an accurate description of her job duties to Dr. Herrin when she met with him on 4-21-11 for her job on and before 7-1-10. Petitioner testified that she had altered her job site in mid July 2010 when she asked Respondent's maintenance department to unlock and pull out her tray so she could lower her computer keyboard four inches. Petitioner said that she also moved her mouse closer to her. Respondent further changed Petitioner's work station on 8-31-10 by moving the mouse closer and having Petitioner use her left hand.

The Arbitrator finds that based on Petitioner's testimony, the opinions of Dr. Li and the opinions of Dr. Herrin, Petitioner's work activities contributed to the development of her right shoulder symptoms requiring surgery on 11-30-10 and 2-20-12. The Arbitrator finds that, as a result of the initial surgery, and the removal of the inferior aspect of the clavicle, Petitioner may have sustained a hairline fracture of her clavicle.

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to her work accident.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? WHAT ARE THE MEDICAL BILLS OWED?

For reasons stated in (C) and (F) above, Respondent is ordered to pay the following reasonable and necessary medical bills under the fee schedule:

OSF Medical Group	$1,824.29
Orthopedic and Sports Medicine	$34,254.90
Total:	$36,079.19.

In addition, Respondent is ordered to hold Petitioner harmless under Section 8(j) of the Workers' Compensation Act for the amount of $38,958.60 for amounts paid by BlueCross BlueShield, Respondent's group insurance carrier. Additionally, Respondent is ordered to reimburse Petitioner in the amount of $5,470.58 for amounts paid out of pocket consistent with Petitioner's Exhibit 14.

L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

The Arbitrator finds that Petitioner's work accident contributed to, or caused, the need for Petitioner's 11-30-10 surgery consisting of a right shoulder arthroscopy with rotator cuff repair, arthroscopic subacromial decompression, biceps tenotomy and debridement of Type I anterior-superior labral tear. The Arbitrator finds that, as a result of this surgery, Petitioner may have sustained a clavicle fracture and that she required a second surgery on 2-22-12 which consisted of arthroscopic extensive debridement and revision of subacromial decompression including removal of scar tissue.

At the time of arbitration, Petitioner testified that she had ongoing pain and symptoms in her right shoulder. Petitioner testified that she experienced pain and discomfort when lifting and reaching.

The Arbitrator therefore finds permanency.